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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 404.

THE PEOPLE OF THE STATE OF NEW YORK,
ex rel. ANNIE COHN,
Appellant,

against

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners constituting the State Tax Commission of the State of New York,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR APPELLEES.

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MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners constituting the State Tax Commission of the State of New York,
Appellees.

BRIEF FOR APPELLEES.

Statement.

This cause comes to this Honorable Court on appeal from a final order and judgment of the Supreme Court of the State of New York pursuant to the provisions of Section 237-a of the Judicial Code, as amended. The final order (R. 32) and judgment (R. 34) appealed from were duly entered on July 14, 1936, and August 18, 1936, respectively, in the office of the Clerk of Albany County, New York, upon the remittitur of the Court of Appeals (R. 30) bearing date July 18, 1936.

The questions presented are whether the State of New York may constitutionally include in the measure of its income tax imposed upon a resident of New York,

(1) income derived from rentals from real property located in New Jersey, and

(2) income derived from bonds and mortgages which are liens upon real estate located in New Jersey, and which bonds and mortgages are physically held or deposited in New Jersey.

Official Report of Opinions Below.

The official reports of opinions filed in the courts below are correctly set forth in appellant's brief.

Statement of Facts.

With certain reservations and exceptions here noted, we adopt the statement of facts set forth at pages 3 to 6 of appellant's brief.

It is said in two places on page 3 of appellant's brief that the income here under consideration was received "or credited to her account." We fail to appreciate the pertinence or importance of the quoted words but, in any event, we are unable to find anything in the record to support any inference that the income here in question was not actually received by appellant. The actual income tax returns filed by appellant are not reproduced in the record and there is nothing to indicate that those returns were computed on an accrual basis rather than a cash basis. On the contrary, the applications for refund (R. 6 to 9) indicate that the income actually was received.

On page 4 of appellant's brief it is said:

> "Since 1913, David Cohn and Maurice Cohn always acted as the agents of the appellant in the State of New Jersey, managed the aforesaid properties besides collecting the rents, collected the interest and the amortization payments on the bonds and mortgages, invested and reinvested same in the State of New Jersey, and received an annual compensation therefor."

There is absolutely no warrant for this statement from anything that appears in the record or that may reasonably be inferred. It is significant that appellant's statement of facts generally is supported by folio references to the record and that the statement to which we take serious exception is devoid of any such reference.

Concededly, David Cohn, Maurice Cohn, and appellant were the executors of the estate of Marcus Cohn, appellant's deceased husband, and appellant by the terms of her husband's will was the beneficiary during widowhood of the entire net income of her husband's estate, but the record is utterly devoid of anything to support the statement that David Cohn and Maurice Cohn were the agents of appellant in managing the assets of the estate and received annual compensation therefor, presumably from appellant.

The Statute.

Believing that the Court will wish to familiarize itself with the nature and effect of the New York Personal Income Tax, we have appended to this brief (Appendix A, pp. 44 to 106) the full text of Article 16 of the Tax Law, as the same was added by Chapter 627

of the Laws of 1919 and as amended through 1935, with the exception of Sections 351-b, 351-c, 351-d, 351-e and 351-f, which sections relate to temporary emergency increases and which, we believe, have no pertinence here.

Summary of Argument.

I. The 1935 Amendment to Section 359 of the Tax Law (Ch. 933, L. 1935), was a valid exercise of legislative authority, and the Legislature had authority to give the act retrospective operation.

II. The nature, character and effect of the New York Personal Income Tax is such that no constitutional infirmity arises from the imposition of the tax upon a resident of New York where the tax is measured by the resident's entire net income which may be derived in part from sources without the State.

III. An income tax, measured by a resident's entire net income, including rent from real property located elsewhere, involves no infringement of the taxpayer's rights under the Constitution of the United States.

IV. The State may include in the measure of a resident's income tax, interest derived from debts, evidenced by bonds of non-residents and secured by mortgages on real estate located in another State; and this, though the bond and mortgage be held or deposited in such other State.

V. Conclusion.

I.

The 1935 Amendment to Section 359* of the Tax Law (Ch. 933, L. 1935), was a valid exercise of legislative authority, and the legislature had authority to give the act retrospective operation.

In 1933 there was presented, in the case of *People ex rel. Pierson v. Lynch,* 237 App. Div. 763, 263 N. Y. 533, 293 U. S. 52, the question whether the State could legally impose its income tax upon a resident, with respect to income derived in part from rentals of Ohio property and in part from profits from the sale of such Ohio property. The imposition of such a tax was assailed both as a matter of statutory construction and upon the ground that it was violative of the Constitution of the United States. On March 15, 1933, the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, rendered its decision (237 App. Div. 763), Presiding Justice Hill writing for a majority of the Court, and Justices Bliss and Rhodes dissenting, holding that the State could not impose an income tax on the rentals from the Ohio land, but that income derived in the form of profits from the sale of such property was subject to the tax, which was considered an excise.

It was our belief at the time that the Court based its decision, with respect to the rentals, upon a construction of the Constitution of the United States. That we were correct in this view is attested by the words of Mr. Justice Hill in the opinion in the instant case when he says (R. 21) that the Appellate Division

* See Appendix A, p. 44.

> "decided that case *(Pierson)* solely upon the ground that under the Fourteenth Amendment to the Federal Constitution it was not within the power of a state, irrespective of the wording of the statute, to tax a resident of the state on account of rentals or income received from land located beyond its borders."

From that portion of the decision which held that a tax could not be imposed upon the rentals from Ohio land, the State Tax Commission appealed to the Court of Appeals and, on November 21, 1933, that Court unanimously affirmed the order appealed from, without opinion (263 N. Y. 533).

The State Tax Commission thereupon made application to this Court for a writ of certiorari to review the determination of the Court of Appeals and, on April 2, 1934, this Court granted the application (292 U. S. 616). The taxpayer opposed the granting of the writ, urging that the record did not show that a Federal question had expressly or necessarily been decided by the State Court.

Upon the oral argument before this Court, the taxpayer renewed such objection to the Court's jurisdiction and, on November 5, 1934, this Court vacated the writ of certiorari theretofore granted as having been improvidently granted, Chief Justice Hughes writing the Court's opinion (293 U. S. 52). The following quotation from that opinion clearly sets forth the basis of the Court's decision:

> "That court, [Appellate Division] while citing decisions of this court under the Fourteenth Amendment, did not state that its decision rested upon the application of the Constitution of the

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> "That court, [Appellate Division] while citing decisions of this court under the Fourteenth Amendment, did not state that its decision rested upon the application of the Constitution of the

United States. The Court of Appeals of the State affirmed the order of the Appellate Division, but without opinion, 263 N. Y. 533; 189 N. E. 684, and the grounds of its decision are left to conjecture. It may be surmised, from the quotations in its opinion, that the Appellate Division intended to rest its decision upon a determination of the application of the Fourteenth Amendment, and that the affirmance by the Court of Appeals went upon the same ground, and not upon the non-federal ground of the application of the Constitution and laws of the State. But jurisdiction cannot be founded upon surmise."

Following the decision of this Court, the State Tax Commission addressed a motion to the Court of Appeals for a reargument or, in the alternative, to amend the remittitur to indicate that its decision was based upon a construction of the Constitution of the United States. The purpose of this motion was, of course, to give this Court jurisdiction of the case. On December 4, 1934, the Court of Appeals denied the motion (266 N. Y. 431), thereby indicating that its affirmance of the order of the Appellate Division might have been based upon a statutory ground rather than upon a construction of the Constitution of the United States or of the State of New York.

For the purpose of removing any possible doubt of the legislative intent, and for no other purpose whatsoever, section 359 of the Tax Law was amended by Chapter 933 of the Laws of 1935 and, as so amended, was given retrospective operation to January 1, 1919. This reason for the amendment was recognized by the Appellate Division when, in the opinion in the instant case (R. 21) by Presiding Justice Hill, it was said:

> "The 1935 amendment (Chap. 933 Laws 1935) only makes more definite and certain the meaning which we gave Section 359 in deciding the Pierson case, and does not detract from the force of that authority."

See also dissenting opinion of Judge Hubbs in the Court of Appeals in the instant case (R. 25).

Consistently, ever since the inception of the Income Tax Law in 1919, the State Tax Commission had imposed taxes upon income received in the form of rents from real estate located without the State. The 1935 amendment, therefore, imposed no new or different tax than had been previously assessed and collected for many years and, as we have indicated, was solely for the purpose of making plain the legislative intent.

The general rule is well settled that retroactive taxation is permissible. Thus, in the case of *Milliken v. United States,* 283 U. S. 15, Mr. Justice Stone said, page 21:

> "But a tax is not necessarily and certainly arbitrary because retroactively applied, and taxing acts having retroactive features have been upheld in view of the particular circumstances disclosed and considered by the court."

And in *People ex rel. Best & Co., Inc. v. Graves,* 265 N. Y. 431, Judge Lehman said, page 436:

> "The intention of the Legislature to make the amendment retroactive stands unquestioned and that intention must be given effect unless it transcends the constitutional powers of the Legislature."

Judge Lehman also referred to the analysis made by Mr. Justice Brandeis in his dissenting opinion in

Untermeyer v. Anderson, 276 U. S. 440, of cases involving retroactive tax statutes and said (page 436) that those cases "leave no doubt that the rule is that no limitation upon the legislative power to impose a tax excludes the power to give retroactive effect to a tax law. Legislative power does not, however, include the power to take private property arbitrarily, whether through exercise, of the power of taxation or otherwise. *Thus, only a retroactive application of a tax law which would result in the taking of property arbitrarily is beyond the power of any legislature.* On challenging a tax it does not suffice to say that it is imposed because of transactions or conditions which antedate the statute. It is necessary to consider the nature of the tax and of these acts and conditions." (Emphasis ours.)

The situation in the instant case is, however, very much simpler. Appellant voluntarily filed income tax returns for 1931 and 1932 in which she included the items of income here in question as part of her gross income and voluntarily paid the taxes revealed by her own computation, all pursuant to the then provisions of the Tax Law. Liability for such tax payments was fixed by the then law and was not increased by the 1935 amendment. The purpose of that amendment was, as we have said, simply to clarify the legislative intent and to permit the question of the State's power to tax income from rents of foreign real property, to be tested solely under the Constitution of the United States.

II.

The nature, character and effect of The New York Personal Income Tax is such that no constitutional infirmity arises from the imposition of the tax upon a resident of New York where the tax is measured by the resident's entire net income which may be derived in part from sources without the State.

Many and varied are the views upon the nature of a state income tax. Having in mind that this Court has said on more than one occasion that taxation is an intensely practical matter and that the resultant effect of a tax is what matters rather than what the tax is called, we shall emphasize the general effect of the tax rather than its nomenclature. Some observations as to the nature and character of the tax, however, seem pertinent.

We are indebted to Professor Robert C. Brown of Indiana University School of Law for a most interesting and discursive article entitled "The Nature of the Income Tax" (17 Minnesota Law Review 127), which we append to this brief (Appendix B, pp. 107 to 132). Professor Brown refers to Cooley on Taxation, 4th ed., vol. 1, §38 where it is said that there are three kinds of taxes, (1) capitation or poll taxes, (2) property taxes and (3) excise taxes, and, though finding an income tax to be closest in analogy to an excise tax, Professor Brown concludes that the "fundamental nature of the income tax is, in short, that it is an income tax and nothing else." The inference is that a fourth kind of tax exists and is an income tax.

We share Professor Brown's view that an income tax is *sui generis* and entitled to a classification by itself. Income taxes existed, in one form or another, in the earlier days of our national life. Following the Civil War the Federal Government resorted to income taxes to replenish the national treasury and such taxes came to be regarded as excises. In 1894, a comprehensive Federal income tax was enacted but was held unconstitutional. Following the adoption of the Sixteenth Amendment, a Federal income tax was enacted and has been in operation ever since. With respect to state income taxes, Wisconsin pioneered in 1911, New York enacted hers in 1919 and, at the present time some 32 states have adopted income tax statutes. The difficulties involved in choosing the exact category of an income tax and the conflicting views on the subject compel us to the conclusion that the tax is sufficiently important and unique to enjoy a class by itself.

We do believe, however, that the New York tax, at least, bears a closer analogy to an excise than seems possible to Professor Brown. Thus, he finds the decision in *Pollock v. Farmers Loan & Trust Co.* (1895), 157 U. S. 429; 158 U. S. 601, "an insuperable objection to this theory." The objection would seem not to be insurmountable in view of the words in *Brushaber v. Union Pac. R. R.* (1916) 240 U. S. 1, at p. 16:

> "Moreover in addition the conclusion reached in the *Pollock Case did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property,* but on the contrary recognized the fact that *taxation on income was in its nature an excise* entitled to be enforced as such unless and until it was concluded that to enforce it would amount to accomplishing the result which the requirement as

> to apportionment of direct taxation was adopted to prevent, in which case the duty would arise to disregard form and consider substance alone and hence subject the tax to the regulation as to apportionment which otherwise as an excise would not apply to it." (Emphasis ours.)

In addition, our income tax resembles an excise in another vital particular, *i. e.*, in the manner in which it is laid. This Court in *Society for Savings v. Coite* (1868), 6 Wall. 594, said, in effect, that an excise and a property tax, when the two approach each other, ordinarily may be distinguished by the respective methods adopted of laying them and fixing their amounts. If a tax is imposed directly by the legislature without assessment, and its sum is measured by the amount of business done or the extent to which the conferred privileges have been enjoyed or exercised by the taxpayer, irrespective of the nature or value of the taxpayer's assets, it is regarded as an excise; but if the tax is computed upon a valuation of property, and assessed by assessors either where it is situated or at the owner's domicile, although privileges may be included in the valuation, it is considered a property tax.

And in Cooley on Taxation, 4th ed., vol. 1, §45, we find:

> "Another thing to be noted, it has been said, is that the obligation to pay an excise tax is based upon the voluntary action of the person taxed in performing the act, enjoying the privilege, or engaging in the occupation which is the subject of the excise, and the element of absolute and unavoidable demand, as in the case of a property tax, is lacking."

In these respects, our income tax closely resembles and operates as an excise. There is the same uncertainty of incidence, the same lack of absolute and unavoidable demand, the same indifference to the nature and value of the taxpayer's assets and the same absence of assessment by assessors. We should think that the principal objection to classifying an income tax precisely as an excise is the difficulty of defining the act, privilege or occupation on which to base the excise.

Nevertheless, as recently as 1931, this Court in *Willcutts v. Bunn*, 282 U. S. 216, made repeated reference to the Federal income tax as an excise and in *People ex rel. Clark v. Gilchrist* (1926), 243 N. Y. 173, Judge (now Mr. Justice) Cardozo noted that the New York Personal Income Tax Law was framed upon the model of the Federal Income Tax Act, though differing in some particulars. In *People ex rel. Pierson v. Lynch* (1933), 237 App. Div. 763, the Court denoted our income tax, in so far as it included income from the profitable sale of Ohio real estate, an excise. See also *Springer v. United States* (1880), 102 U. S. 586.

Mississippi's income tax, as applied to a resident's income from business activities conducted without the state, was under consideration in *Lawrence v. State Tax Commission* (1932), 286 U. S. 276. It was held that the tax, as there imposed, was not in contravention of any constitutional provision. This Court referred to the definition of the tax by the Supreme Court of Mississippi as an excise and not a property tax but said that in passing on its constitutionality, concern must be had only with the practical operation, not with

its definition. Concerning the fundamental authority and justification for the tax Mr. Justice Stone, writing for this Court, said, p. 279:

> "The obligation of one domiciled within a state to pay taxes there, arises from unilateral action of the state government in the exercise of the most plenary of sovereign powers, that to raise revenue to defray the expenses of government and to distribute its burdens equitably among those who enjoy its benefits. *Hence domicile in itself establishes a basis for taxation.* Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable from the responsibility for sharing the costs of government." (Emphasis ours.)

And, further, p. 280:

> "It is enough, so far as the constitutional power to levy it is concerned, that the tax is imposed by Mississippi on its own citizens with reference to the receipt and enjoyment of income derived from the conduct of business, regardless of the place where it is carried on. The tax, which is apportioned to the ability of the taxpayer to bear it, is founded upon the protection afforded to the recipient of the income by the state, in his person, in his right to receive the income, and in his enjoyment of it when received. These are rights and privileges incident to his domicile in the state and to them the economic interest realized by the receipt of income or represented by the power to control it, bears a direct legal relationship. It would be anomalous to say that although Mississippi may tax the obligation to pay appellant for his services rendered in Tennessee, still, it could not tax the receipt of income upon payment of that same obligation. *We can find no basis for holding that taxation of the income at the domicile of the recipient is either within the purview of the rule now established that tangibles located outside the state of the owner are not subject to taxation within it,* or is in any respect so arbitrary or unrea-

> sonable as to place it outside the constitutional power of taxation reserved to the state." (Emphasis ours.)

Oklahoma's income tax, as imposed upon non-residents with respect to income derived from any business, trade, profession or occupation carried on within the state, was under review in *Shaffer v. Carter* (1920), 252 U. S. 37 and was upheld by this Court. While open, perhaps, to the objection of being *dicta*, it was said by this Court, p. 57, that the tax as imposed upon residents "includes all income derived from their property and business within the state *and, in addition, any income they may derive from outside sources.*" (Emphasis ours.)

And, again, it was said, p. 57:

> "As to residents it [the state] may, and does, exert its taxing power over their *income from all sources, whether within or without the state*, and it accords to them a corresponding privilege of deducting their losses, wherever they accrue." (Emphasis ours.)

In *Shaffer v. Carter, supra*, reference is also made to the fact that income taxes are a recognized method of distributing the burdens of government, favored because requiring contributions from those who realize current pecuniary benefits under the protection of the government, and because the tax may be readily apportioned to their ability to pay.

The Massachusetts income tax, as applied to the income of a resident derived from a testamentary trust comprised of personalty having its situs in Pennsyl-

vania, was upheld in *Maguire v. Trefry* (1920), 253 U. S. 12. This case was distinguished in *Senior v. Braden* (1935), 295 U. S. 422, on the ground that the tax involved in the *Maguire* case was an income tax and, while certain cases cited in the *Maguire* case have been overruled, the result is still sound. This Court quoted with approval from the opinion of the Massachusetts Supreme Judicial Court, as follows, p. 14:

> "The income tax is measured by reference to the riches of the person taxed actually made available to him for valuable use during a given period. It establishes a basis of taxation directly proportioned to ability to bear the burden. It is founded upon the protection afforded to the recipient of the income by the government of the Commonwealth of his residence in his person, in his right to receive the income and in his enjoyment of the income when in his possession. That government provides for him all the advantages of living in safety and in freedom and of being protected by law. It gives security to life, liberty and the other privileges of dwelling in a civilized community. It exacts in return a contribution to the support of that government measured by and based upon the income, in the fruition of which it defends him from unjust interference."

This reasoning, similar to that in *Lawrence v. State Tax Commission* and in *Shaffer v. Carter, supra,* coincides with the views of the celebrated economist, Adam Smith, who wrote, in that part of his work, Wealth of Nations (1776), having to do with taxation:

> "The subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state."

In *United States Glue Company v. Oak Creek* (1918), 247 U. S. 321, it was held that the Wisconsin income tax, laid upon the gains and profits of a domestic corporation including net income from transactions in interstate commerce, did not contravene the commerce clause of the Constitution of the United States. This because, p. 329:

> "Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States."

New York's income tax, as originally enacted, came before this Court in *Travis v. Yale & Towne Mfg. Co.* (1920), 252 U. S. 60. Only the provision having to do with the allowance of personal exemption was under review; as then constituted, it was found to discriminate against non-residents. The defect has since been remedied. In so far as jurisdiction to tax was concerned, the cause was controlled by the decision in *Shaffer v. Carter, supra,* decided the same day by this Court.

The nature and effect of the New York income tax has been considered and defined by the New York Courts in *People ex rel. Central Union Trust Co. v. Wendell* (1921), 197 App. Div. 131, affd. 231 N. Y. 629 as follows, p. 135:

"There is still another view to take of this question. *The income tax is not directly at least imposed on any particular income.* The recording tax is imposed on the mortgage (§253); the income tax is imposed on the individual. It is 'imposed upon every resident of the State' (§351). *His income is used only in fixing the measure of such tax.* It is the net income on which the tax is computed (§351). The 'net income' means the 'gross income' of the taxpayer less legal deductions (§357) and in determining the 'gross income' mortgage interest as well as all other income is included with numerous exceptions specified in section 359. From such 'gross income' thus determined are to be subtracted numerous deductions (§360) and also certain exemptions (§362) before the tax is computed. *Hence the income from any particular source is but one element to be considered in connection with other elements in determining the measure of the taxation which is imposed on the individual. In no proper sense may it be said that the tax is imposed on the interest of any particular mortgage.* That is merely a factor in the determination of the amount of such taxation." (Emphasis ours.)

Similarly, in *Peck v. Lowe* (1917), 247 U. S. 165, this Court said (p. 174) that an income tax was not laid upon income "because of its source, or in a discriminatory way, but just as it is laid on other income," and that the tax was both nominally and actually a general tax laid upon net income arising or accruing from all sources without discrimination, the *source* of the income being affected but *indirectly* and *remotely,* for the reason that the tax was levied "after the recipient of the income is free to use it as he chooses."

Coming to consider the practical application and effect of our income tax, we place no reliance upon the

statutory provision (§363 Tax Law) allowing a reciprocal credit to non-residents for income taxes paid to the state of their residence, as validating a tax which might otherwise be invalid. It is, however, more than likely that New Jersey, should she enact an income tax law, would adopt the model law sponsored by the National Tax Association which contains a reciprocal credit provision similar to that in the New York law.

Travis v. Yale & Towne Co. (1920), *supra*, 252 U. S. 60.

We are also aware of the trend of the decisions of this Court limiting, with respect to property and succession taxes, the taxing power of both a domiciliary and a non-domiciliary state.

Safe Deposit & Trust Co. v. Virginia (1929), 280 U. S. 83,

Farmers Loan & Trust Co. v. Minnesota (1930), 280 U. S. 204,

Baldwin v. Missouri (1930), 281 U. S. 586,

Beidler v. South Carolina (1930), 282 U. S. 1.

First National Bank v. Maine (1932), 284 U. S. 312,

Senior v. Braden (1935), 295 U. S. 422.

Wheeling Steel Corp. v. Fox, (1936). 298 U. S. 193.

Based largely on her conception of these decisions, appellant makes the dogmatic statement (p. 20 of Appellant's Brief) that "multiple state taxation contravenes the due process clause of the Fourteenth Amendment," which is saying a great deal more than we have ever understood this Court to hold. Such a

conclusion requires a defining of what exactly constitutes double or multiple taxation, which, in specific cases, may be simple enough but, as a generic term, defies exact definition. We readily concede, as indeed we must, that these cases have the effect of limiting, in the case of property taxes and inheritance taxes, taxation of intangibles to the domiciliary state except where localized in another state and, then, limiting taxation to such non-domiciliary state. We hope to persuade this Court that an income tax is so vitally and organically different from a property or inheritance tax that more liberal taxing powers should there be tolerated.

With reference to the New York Personal Income Tax, Section 351 of the Tax Law imposes an income tax at specified rates "upon every resident of the state" with respect to his entire net income. By section 357, the term "net income" means the gross income of the taxpayer less the statutory deductions which include (section 360) expenses, interest payments, certain taxes, losses, worthless debts, depreciation, depletion and obsolescence and certain contributions and gifts. In addition, by section 362 certain purely personal exemptions are allowed, depending for their amount upon whether the taxpayer is married or single and the number of his children or dependents.

Section 359 defines "gross income" as including, among other things, gains, profits and income derived from dealings in real or personal property, whether located within or without the state; also interest and rent, including rent derived from real property situated outside the state. The legislative intent is plain-

ly stated as including "all of the foregoing items, without regard to the source thereof, location of the property involved, or any other factor, except only a case where the inclusion thereof would be violative of constitutional restrictions."

The tax is, with respect to residents, as denominated, a tax upon the person and is measured by the amount of his entire statutory net income, which reflects the amount of income, after deduction of all losses and expenses incurred in producing it, which he is able to take to himself here and use as he chooses. The tax is general and non-discriminatory and, being graduated and subject to certain personal exemptions, is carefully proportioned to the ability of the individual to respond to the necessary costs of government.

From the standpoint of the taxpayer, the source of any particular item of income is immaterial since the tax is general and has incidence only provided his entire net income, as computed on the last day of the calendar year or fiscal year, exceeds the statutory personal exemptions. The tax is payable 3½ months after the close of the tax year (§ 371). The source of a taxpayer's income is material only when the tax may burden or impede the usual governmental functions of the United States or may diminish the salary of a state officer enjoying constitutional protection against diminution of his salary.

Thus, a resident may own all of the land in one of New Jersey's counties and if it produces no income, no tax results. Nor does the tax have incidence if New Jersey property produces net income to a New York

resident, but is offset by losses sustained elsewhere so that no entire net income results. Furthermore, a New York resident owning New Jersey real estate would be entitled to deduct from his gross income losses sustained in connection with his New Jersey property (§353) and taxes paid thereon (§360, subd. 3). In no event could the tax attach to or become a lien upon the property; on the contrary the tax is specifically made a personal debt of the taxpayer (§352). Indeed, it is conceivable and frequently occurs that the property producing income subject to the tax has long been disposed of when the tax is computed or becomes payable.

Thus, the income tax differs vitally from a property tax or an inheritance tax. Such taxes have certainty of incidence dependent upon the ownership or the transfer of property and attach to and become liens upon the property. The income tax has no certainty of incidence and in no way affects the property except as it may be said remotely and indirectly to burden it.

So-called double or multiple taxation, prior to 1930, was genuinely vexatious in the case of inheritance taxation. The ownership of a single share of stock in a decedent's estate could, and frequently did, require tax proceedings in a number of states and result in a multiplicity of taxes, making the cost of effecting a transfer perhaps exceed the value of the property. Reciprocal exemptions enacted by the several states were relieving the situation somewhat but the final solution came about through the decisions of this Court beginning with *Safe Deposit & Trust Co. v. Virginia, supra,* and completed in *First National Bank v.*

Maine, supra. Property taxes assessed upon intangible personal property were perhaps less onerous, but being taxes *in rem*, should be restricted to the state where the property is localized or has a business situs, or if it has none, to the state of the owner's domicile. *Wheeling Steel Corporation v. Fox, supra.*

But an income tax is essentially a tax *in personam* and principles applicable to inheritance taxes and *ad valorem* property taxes should not be confusedly invoked.

New Jersey has no income tax but she certainly has power to enact one and to subject to her tax the income of a New York resident derived from property owned in New Jersey. Therefore, we discuss the situation in the instant case from that standpoint. Appellant is a resident of New York and derives her entire income from property located in New Jersey. Clearly, New Jersey protects her in her property and New York protects her in her person. If then, her net income exceeds the allowable personal exemptions (and New Jersey must not discriminate to favor residents) why should not each State exact a *quid pro quo* proportioned to her ability to pay? New York's tax does not affect, attach to, or become a lien upon her New Jersey property.

New York merely says, if you wish to enjoy the benefits of residence here, pay us a personal tax which will be computed upon your net income from all sources. If, through unfortunate investments made here or elsewhere, the losses offset the income from your New Jersey property, you need pay no tax; indeed

if you receive income from sources in New York and your New Jersey property becomes unprofitable, you may deduct those losses from your gross income here. New Jersey could impose an income tax, of course, only if the New Jersey property produced net income over and above expenses and charges incurred in producing it.

But appellant contends for the right to enjoy the benefits of New York residence and to be able to take to herself here and enjoy as she chooses, sizable annual net income and yet escape scot-free from the payment of any tax. Her contention, if upheld, would discriminate against and place at a disadvantage the great mass of her fellow-residents who, except the comparatively few similarly circumstanced, are required to contribute to the costs of our government.

We do not understand appellant's reference to possible multiple state taxation by which, we assume, is meant taxation by more than two States. Such a situation might arise where an individual conducted a business in three or more States, but that is not the case here. In any event, taxation by the domiciliary State of income from business activities carried on elsewhere has been upheld by this Court in *Lawrence v. State Tax Commission, supra.* And it would certainly seem that if a resident of New York must include in the measure of his income tax income from business done without the State, he should likewise be required to include income from property owned without the State.

A veritable paradox of reasoning is indulged in by appellant in seeking to distinguish the *Lawrence* case.

On page 19 of appellant's brief it is said that the decision there necessarily invoked "the *mobilia* maxim", but on page 24 appellant arrives at the interesting conclusion, after discussing *First National Bank v. Maine,* decided prior to the *Lawrence* case, that "the *mobilia* maxim has been thoroughly emasculated"!

We respectfully submit that *Lawrence v. State Tax Commission, supra,* rested upon very much broader ground than merely that Mississippi could tax the income because she could tax the obligation to pay for services rendered in Tennessee. This Court clearly said that taxation of income at the domicile of the recipient does not come within the purview of the rule that tangibles, which would include real estate, located outside of the domiciliary state are not subject to taxation within it, nor is it in any respect so arbitrary or unreasonable as to place it outside the domiciliary state's constitutional power of taxation.

In our view, *Lawrence v. State Tax Commission, supra,* is controlling here and appellant can succeed only if this Court concludes to overrule that decision. Appellant says (p. 19 of Brief) that the decision is not in harmony with *Senior v. Braden* and *Wheeling Steel Corp v. Fox.* It suffices to say that both those cases involved a property tax and not, as here, a personal income tax.

We believe that we have dealt with the nature and effect of the tax here involved sufficiently to demonstrate that it is neither arbitrary nor discriminatory and that rules of law applicable to inheritance and property taxes, said to bar so-called multiple taxation, should not be here applied.

We conclude this point with a suppositious situation intended graphically to portray the unreasonableness of the appellant's contentions. Let us assume that there are four residents of New York whom we designate A, B, C and D, each having the identical amount of X dollars of net income. A's income is derived entirely from rental of a factory building in Jersey City, B's from interest on a mortgage on the factory, C's from the business of operating the factory, and D's from rental of a factory building in New York City.

If appellant's contentions be upheld, A and B are relieved from payment of the New York income tax, while C and D must pay. The situation is aggravated if, as we believe, this Court will find little merit in appellant's view that the mortgages from which she received interest were invested with a business situs in New Jersey. Then only A would enjoy immunity from our income tax and we think that great difficulty would attend explaining to B, C and D why, on any fair, reasonable and common sense basis, they should be required to pay a tax from which A was entirely relieved.

III.

An income tax, measured by a resident's entire net income, including rent from real property located elsewhere, involves no infringement of the taxpayer's rights under the Constitution of the United States.

The keystone of appellant's contention here, as it was in the *Pierson* case, is the decision of this Court in

Pollock v. Farmers Loan & Trust Co., (1895), 157 U. S. 429, rehearing (1895) 158 U. S. 601. Upon this case rest the advisory opinions of *Opinion of the Justices*, 84 N. H. 559, 149 A. 321 and 220 Mass. 613, cited by appellant, and the decision in *Peo. ex rel. Pierson v. Lynch, supra.* We respectfully submit that these decisions, and appellant's contention here, rest upon the erroneous belief that the *Pollock* case held that a tax on the income from property was a tax upon the property itself, subject to every constitutional restraint and limitation attaching to a tax upon the land. We hope to convince this Court of the incorrectness of that view.

The late Chief Judge Pound, in an address before the New York State Bar Association, said:

> "I think that lawyers and judges too often fail to recognize that the decision consists in *what was done, not what is said by the court in doing it.* Every opinion is to be read with regard to the facts in the case *and the question actually decided.*" (Emphasis ours.)
>
> N. Y. Bar Assoc. Bulletin, Sept. 1929, p. 279.

And some years earlier Judge (Now Mr. Justice) Cardozo, in distinguishing the opinions of the Court of Appeals in two prior cases wrote in *People ex rel. Desiderio v. Connolley,* (1924), 238 N. Y. 326, at p. 331:

> "No doubt there was much said in each of these opinions to give support to this belief. If we separate, however, things said from those decided, the question, supposed to be foreclosed, is seen to be open."

In the various opinions in the *Pollock* case, occupying, as they do, 101 pages in 157 U. S. and 98 pages in

158 U. S., much was *said* by the Court, pro and con, but what was *actually decided,* so far as at all relevant here was that a Federal tax on the income of real property was a direct tax within the meaning of Art. I, section 2, clause 3, and Art. I, section 9, clause 4 of the Constitution of the United States and, hence, subject to the rule of apportionment among the states. The effect of the decision was, of course, obviated by the subsequent enactment of the Sixteenth Amendment. The *actual decision* in the *Pollock* case has *absolutely no bearing* upon the point at issue here.

There is no room whatever for doubt as to the holding in the *Pollock* case, as is evidenced by the words of Chief Justice Fuller, page 618 of 158 U. S.:

> "Our previous decision was confined to the consideration of the validity of the tax on the income from real estate and on the income from municipal bonds. The question thus limited was whether such taxation was direct or not, in the meaning of the Constitution; *and the Court went no farther, as to the tax on the income from real estate, than to hold that it fell within the same class as the source whence the income was derived, that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct.*" (Emphasis ours.)

And in *Knowlton v. Moore,* (1900), 178 U. S. 41, this Court said, of its decision in the *Pollock* case, page 82:

> "*The constitutional meaning of the word direct was the matter decided.* Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons solely because of their general ownership of property from being levied by any other rule

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> "*The constitutional meaning of the word direct was the matter decided.* Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons solely because of their general ownership of property from being levied by any other rule

than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property. Secondly, that the tax on the income derived from such property, real or personal, was *the legal equivalent of a direct tax on the property from which said income was derived,* and hence must be apportioned." (Emphasis ours.)

In *Flint v. Stone Tracy Co.,* (1911), 220 U. S. 108, the Court said, page 162:

"In the *Pollock* case, as we have seen, the tax was held unconstitutional, because it was *in effect* a direct tax on the property solely because of its ownership." (Emphasis ours.)

In *McCoach v. Minehill Railway Co.,* (1913), 228 U. S. 295, at page 301, this Court, analyzing its decision in the *Flint v. Stone Tracy* case said:

"In discussing the constitutional question, reference was first made to the case of Pollock v. Farmers Loan & Trust Co. • • • which held the income tax provisions of the Act of August 27, 1894 • • • to be unconstitutional because *amounting to* a direct tax within the meaning of the Constitution, and because not apportioned according to population as required by that instrument." (Emphasis ours.)

In *Stratton's Independence v. Howbert,* (1913), 231 U. S. 399, at page 414:

"This court had decided in the *Pollock Case* that the income tax law of 1894 *amounted in effect to a direct tax* upon property, and was invalid because not apportioned according to population as prescribed by the Constitution." (Emphasis ours.)

No one doubted the power of Congress to impose an income tax—the only question involved in the *Pollock* case was the mode of laying the tax. If it was held to be a direct tax, it was subject to the rule of apportionment among the States, whereas, if it was an excise, it was subject only to the rule of uniformity.

The constitutional limitations upon the manner of imposing a direct tax are said to have the purpose of preventing any State being called upon to contribute more than its due share of the burdens of the Federal government.

Cooley on Taxation, 4th Ed., Vol. 1, §110.

See also,

Meigs, The Growth of the Constitution, 2nd Ed., 1900, pp. 41-66, pp. 159-168;

Eliot, Debates in the Federal Convention, V. 302.

Clearly, Congress could not lay a direct property tax without apportioning it in accordance with the population of the several States, exactly as representatives are allotted among the several States. The practical effect is that when the representatives of any one State vote in the House upon a law imposing a direct property tax, they do so under the restraint that, according as they possess the political power to vote the tax, it falls upon the citizens of the State they represent. By the same token, the representatives of a group of States least affected by a proposed tax cannot combine to vote a tax, the burden of which would fall upon a few wealthier States. Thus, it was said in the *Pollock* case, p. 582 of 157 U. S.:

> "It is true that the effect of requiring direct taxes to be apportioned among the States in proportion to their population is necessarily that the amount of taxes on the individual taxpayer in a State having the taxable subject-matter to a larger extent in proportion to its population than another State has, would be less than in such other State, but this inequality must be held to have been contemplated, and was manifestly designed to operate to restrain the exercise of the power of direct taxation to extraordinary emergencies, and to prevent an attack upon accumulated property by mere force of numbers."

Finding that a tax upon the income from real estate would accomplish substantially the result which the rule of apportionment was designed to bar, the Court held the tax to be violative of the constitutional provisions requiring apportionment of direct taxes.

Brushaber v. Union Pac. R. R. Co., (1916) 240 U. S. 1, 16.

But the Court had no occasion to, and did not hold that a tax affecting the income from land was, in fact, a tax upon the land, subject to every constitutional restriction applicable to a land tax.

In other words, the Court considered the effect of the tax, not from the standpoint of the taxpayer, though he certainly was affected, but rather from the standpoint of the effect of the tax upon our dual system of government. For the same reason such cases as *Northwestern Mutual Life Ins. Co. v. Wisconsin*, (1927), 275 U. S. 136, *National Life Ins. Co. v. United States*, (1928), 277 U. S. 508, *Metcalf & Eddy v. Mitchell*, (1926), 269 U. S. 514, *Gillespie v. Oklahoma*,

(1922), 257 U. S. 501, and *Burnet v. Coronado Oil & Gas Co.*, (1932), 285 U. S. 393, cited by and relied on by appellant have no pertinence here. In those cases, the effect of the tax is considered, not from the standpoint of the taxpayer, but as affecting the proper functioning of the government through a tax upon its instrumentalities. No such question is here involved.

New York cannot tax New Jersey land because New York is utterly without jurisdiction over such a tax subject. But because New York imposes a tax upon one of her residents, which tax remotely and through a double indirection *may* operate so as, in some degree, to burden New Jersey land is no reason, in our view, to strike down the tax.

New York, we urge, has the constitutional and plenary authority and power to lay a tax upon persons domiciled within her borders and to measure such a tax by their net incomes from all sources. Thus, in *McCulloch v. Maryland,* (1819), 4 Wheat. 316, Mr. Chief Justice Marshall spoke of the vital necessity of the power of taxation to the very existence of government and said, p. 428:

> "The people of a State, therefore, give to their government a right of *taxing themselves and their property,* and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representatives, to guard them against its abuse." (Emphasis ours.)

We think the great Chief Justice chose his words deliberately when he spoke of the people "taxing them-

selves and their property", indicating that persons and property are separate and distinct tax objects. On page 429, the Chief Justice gives utterance to the fundamental principle that "all subjects over which the sovereign power of a State extends, are objects of taxation". It would seem necessarily to follow that appellant, domiciled in New York, constitutes, in her person, an object of taxation to which the taxing power of the State extends.

And, as recently as 1934, this Court in *Virginia v. Imperial Coal Co.*, 293 U. S. 15, 19, referred to the principle that domicile in a state establishes a basis for taxation.

The Courts of New York have held that a tax on rentals of real property is not a tax upon the property producing such rentals. A legislative Act passed May 13, 1846, made certain rentals from real estate taxable as personal property. In *Van Rensselaer v. Dennison*, (1850), 8 Barb. 23, the Court was called upon to decide whether a provision in a lease requiring the lessee to pay all taxes that might be assessed upon the "granted premises" or upon the lessor "for and in respect of said premises", made it obligatory upon the lessee to pay the tax imposed upon the rentals. The Court held that the tax on rentals was *not* a tax upon the "granted premises" nor upon the landlord "for and in respect of such premises".

The Court said, page 26:

> "Was this a tax 'for said premises,' and also 'in respect of said premises?' It must be both, to be within the covenant. I think it was neither. It

> was not a tax 'for said premises;' that would mean the same as a tax 'on said premises,' and I do not see how it can properly be said to be a tax 'in respect of' said premises, because it was on rents that issued out of said premises. The plaintiff was not taxed for and in respect of said premises, but for and in respect of the rents reserved thereon. The value of the premises had no influence in regulating the amount of the tax. The rent reserved might be a high one on a poor farm or a low one on a valuable farm. The farm was never appraised, nor its value estimated. The tax was laid without reference to the farm, and in no sense, 'in respect to the premises,' or their value. It was the income of a person which was taxed, at a uniform value, prescribed by the statute. *Suppose a general income tax should be laid, and the plaintiff in this case should be assessed for his whole income; could he collect a part of the tax from the defendant, under this covenant, because a portion of his income was rent of the defendant's farm? I think not; nor do I see how the cases would differ in principle. In both it would be a tax on the income alone.*'' (Emphasis ours.)

The opinion in the *Van Rensselaer* case is cited with approval in *Woodruff v. Oswego Starch Factory* (1903), 177 N. Y. 23, 30, in which case the Court of Appeals made the same ruling in a similar situation, affirming the Appellate Division (70 App. Div. 481) which latter Court, in the course of its opinion (p. 484) explained and distinguished the decisions in the *Pollock* case.

Certainly, land in New Jersey enjoys no greater immunity from taxation by New York than does land in Mexico from taxation by the United States. If a tax on income from rents of real property actually is a tax on the land, then it must inevitably follow that the

United States cannot subject to a Federal income tax, the income of a United States citizen derived from rents on land in Mexico. That exact situation came before this Court in 1923, in the case of *Cook v. Tait*, 265 U. S. 47. Counsel for the taxpayer cited the *Pollock* case in support of his contention that the Congress was without power to impose an income tax upon income derived solely from real and personal property permanently located within the territorial jurisdiction of the Republic of Mexico (p. 47). It further appeared that the taxpayer, though a citizen of the United States, was himself permanently resident and domiciled in the City of Mexico.

This Court, quite evidently, considered the decision in the *Pollock* case to have no application to the facts under consideration because no reference to that case is found in the opinion in the *Cook* case. The Court held that the Congress had the power to tax the income received by a citizen of the United States, who was himself domiciled abroad, derived from property located without the territorial jurisdiction of the United States.

We fully appreciate that it may be said that the taxing power of the United States differs from the taxing power of the States, and that the operation of the Fifth Amendment upon the powers of the Congress is not identical with the application of the Fourteenth Amendment to the powers of the States. But the conclusion, that this Court could not have ruled as it did in *Cook v. Tait, supra,* with respect to Federal taxation of income from Mexican lands if the *Pollock* case decided that a tax on rental income was a tax on the land pro-

ducing such income, is, we submit, unanswerable. (See also, *Cotterman v. United States* (1926), 62 Ct. Claims 415, certiorari denied 273 U. S. 732.)

We strongly urge that the *Pollock* case has no more bearing upon the issue involved here than it had upon the question concerned in *Cook v. Tait*. That case, as does the instant case, involved the question of *power to tax*. The *Pollock* case concerned the question of the constitutional *method of taxation*—whether or not the rule of apportionment among the States applied—and not the question of power to tax because no one disputed the power of Congress to lay a direct tax on incomes, provided the tax was apportioned according to the population of the various States.

Appellant leans heavily upon the decision of this Court in *Senior v. Braden* (1935), 295 U. S. 422; as we think, misapprehending the effect of that decision. The facts there dealt with an Ohio tax on investments and other intangible property of persons residing within the State of Ohio. The term "investment" was defined to include incorporeal rights of a pecuniary nature, from which income is or may be derived, including equitable interests in land and rents. A tax was imposed *upon such investments*, measured by the income yield therefrom. The taxpayer was the owner of several transferable certificates showing him to be the beneficiary under certain declarations of trust and entitled to stated portions of rent derived from specified parcels of land, some within and some outside of Ohio. The question *actually decided* by the Court was that the property of the taxpayer, represented by the ownership of his certificates, was an interest in the

land, and it was conceded that the tax was unconstitutional, if such was found to be the fact. The decision has no bearing, as a precedent, upon the question before this Court in the instant case. While purely *obiter dicta,* it is extremely interesting to note that Justices Stone, Brandeis and Cardozo entertain no doubt "that a State may tax the income of its citizen derived from land in another State" (page 436).

We respectfully submit that the restriction against the taxation by a State of real property located beyond the borders of the taxing State, has no application to the taxation by a State of one of its residents, with respect to income from real property located in another jurisdiction where the taxation reaches such income, as part of a general integrated system of income taxation, after the deduction of any and all expenses incurred in the production of such income, and where the particular item of income has lost its identity by becoming intermingled with and part of the resident's entire net income from all sources.

IV.

The State may include in the measure of a resident's income tax, interest derived from debts, evidenced by bonds of non-residents and secured by mortgages on real estate located in another State; and this, though the bond and mortgage be held or deposited in such other State.

The point just made seems so well settled as to require little in the way of argument or citation of authority. One of the leading cases is *Kirtland v. Hotch-*

kiss (1879), 100 U. S. 491, which is frequently cited with approval in later cases. This Court there said, page 498:

> "Plainly, therefore, our only duty is to inquire whether the Constitution prohibits a State from taxing, in the hands of one of its resident citizens, a debt held by him upon a resident of another State, and evidenced by the bond of the debtor, secured by deed of trust or mortgage upon real estate situated in the State in which the debtor resides.
>
> "The question does not seem to us to be very difficult of solution. The creditor, it is conceded, is a permanent resident within the jurisdiction of the State imposing the tax. The debt is property in his hands constituting a portion of his wealth, from which he is under the highest obligation, in common with his fellow-citizens of the same State, to contribute for the support of the government whose protection he enjoys.
>
> "That debt, although a species of intangible property, may, for purposes of taxation, if not for all others, be regarded as situated at the domicile of the creditor. It is none the less property because its amount and maturity are set forth in a bond. That bond, wherever actually held or deposited, is only evidence of the debt, and if destroyed, the debt—the right to demand payment of the money loaned, with the stipulated interest—remains. Nor is the debt, for the purposes of taxation, affected by the fact that it is secured by mortgage upon real estate situated in Illinois. * * * The debt, then, having its *situs* at the creditor's residence, both he and it are, for the purposes of taxation, within the jurisdiction of the State. It is, consequently, for the State to determine, consistently with its own fundamental law, whether such property owned by one of its residents shall contribute, by way of taxation, to maintain its government."

Without any question, appellant is the legal owner of an interest in the mortgages here in question, which

interest is intangible personal property, and has its *situs* in this State. It is true that an exception is made to the rule that intangibles take the domicile of their owner, in the case of intangibles having a business *situs* in another State. Appellant urges that that exception be applied here and cites cases in which the exception has been invoked.

New Orleans v. Stempel (1899), 175 U. S. 309;
Bristol v. Washington Co. (1900), 177 U. S. 133, 141;
State Board of Assessors v. Comptoire, etc. (1903), 191 U. S. 388;
Metropolitan Life Insurance Co. v. New Orleans (1907), 205 U. S. 395;
Liverpool & L. & G. Ins. Co. v. Board of Assessors (1911), 221 U. S. 346;

Those cases are of doubtful pertinence here since they involved taxation of non-residents and not, as here, the taxation of the income of a resident. Moreover, in all those cases, there was evidence showing that the intangibles there in question had been used as part of a business conducted in the foreign state.

Thus, in *Beidler v. So. Carolina* (1930), 282 U. S. 1, this Court said, page 8:

> "But a conclusion that debts have thus acquired a business *situs* must have evidence to support it * * *."

Such evidence is completely lacking here; in fact, it plainly appears that the mortgages in question were held simply as investments and formed no part of any business conducted in New Jersey. We have already taken exception to appellant's statement (p. 4 of Brief)

to the effect that David Cohn and Maurice Cohn "acted as the agents of the appellant" in managing the property which gave rise to appellant's income. In a futile effort to import a business *situs* in New Jersey to the bonds and mortgages from which appellant derived income in the form of interest, appellant reiterates (p. 20 of Brief) the totally unwarranted statement that "all of her property [was] managed by her agents there [New Jersey]."

Of course, appellant's co-executors were not her agents and there was no business conducted in New Jersey. Nor is there anything in the record anywhere from which there can be spelled out anything in the way of transactions or activities even approaching the conduct of a business. All that appears from the record is that the estate of Marcus Cohn deceased has always been administered in New Jersey by the three executors, one of whom was appellant (R. 13) and that the mortgages were on New Jersey property and were physically held and deposited in New Jersey (R. 14-15). In such circumstances, no business *situs* in New Jersey can be said to exist.

In *People ex rel. Booth v. Gilchrist* (1925), 212 App. Div. 763, it was held that the mere investment and conservation of an estate did not constitute the carrying on of any trade or business.

The question whether bonds and mortgages owned by a resident of Connecticut had a business *situs* in New York, because the mortgages were liens on New York real estate and were physically held in New York by the owner's agent who had authority to invest and

reinvest at his discretion, came before the Supreme Court of Errors of Connecticut in *Manufacturer's Trust Co. v. Hackett* (1934), 118 Conn. 101, 170 Atl. 792. It is at once apparent that the facts in that case, upon which it was contended that a business *situs* in New York existed, were very much stronger than in the instant case. Nevertheless, the high court of Connecticut concluded that the bonds and mortgages had no business *situs* in New York, saying:

> "This situation when viewed as a whole cannot fairly be regarded as constituting the engaging or employing of capital in business by the decedent through her agent in any sense which reason and the precedents, when broadly considered, indicate as being that contemplated in order to constitute business *situs*. Activities and operations of a business nature were limited to the management, investment, and reinvestment of the decedent's private estate, differing in no respect from what she could and naturally might have done for herself but for disqualifications of age and inexperience. They savor not at all of the loaning of money to the public as a business or other operations for profit which the nature and logical justification for the doctrine connote and which, as we have noted, has usually characterized situations recognized as conferring a business *situs*. Under such circumstances, at least, authority in an agent to invest and reinvest principal as well as collect and remit to the owner does not, as indicated *obiter* in Lockwood v. Blodgett, constitute such an engaging in business as to create this *situs*."

It is respectfully submitted that there can be not the slightest doubt that the income of appellant received from these New Jersey mortgages was properly subjected to a New York income tax.

V.

Conclusion.

We respectfully submit that our income tax is so strikingly different in its operation and effect from a succession tax or a property tax that the tax, as here imposed, should be upheld despite the fact that, by the inclusion of appellant's entire income, both the State of domicile and the State having *situs* of the property *may* reach the same income by a tax, *sui generis* as to kind, but having mostly the character of an excise.

The tax is general and non-discriminatory and, to sustain appellant's contention, would place her at an unfair advantage over many of her fellow-residents. It would seem, further, that a reversal of the judgment of the New York Court of Appeals in this case would require overruling, or at least casting serious doubt upon, the decision of this Court in *Lawrence v. State Tax Commission, supra.*

Sustaining the tax would not result in countenancing an onerous or arbitrary tax, since it is carefully proportioned to appellant's ability to pay and reaches the income from New Jersey property only when and if her entire net income from all sources exceeds her statutory personal exemption. Further, though we do not urge it as validating the tax if otherwise bad, reciprocal statutory credits enacted by New York and New Jersey would undoubtedly reduce or entirely eliminate a New Jersey tax.

"Logic and taxation are not always the best of friends," observed Mr. Justice McReynolds in *Sonne-*

born Bros. v. Cureton (1922), 262 U. S. 506, 522. The instant case, however, presents a situation in which logic and taxation walk hand in hand. The most scientific and logical form of taxation rests upon as broad a base as possible and is proportioned to the ability of the taxpayer to pay for definite benefits bestowed upon him, in his person or his property, by the taxing power.

We respectfully contend that the New York Personal Income Tax fully meets these tests and, so far as its broad application is concerned, is limited only by constitutional inability to burden Federal functions or to diminish salaries of officers constitutionally protected against diminution of compensation. Further limitations, as here contended for by appellant, would seriously interfere with the desirable aim of spreading the costs of government over as large a base as possible, especially in view of implications affecting taxation of the income of a resident from tangible personal property and business activities outside the State.

It is respectfully submitted that the final order and judgment of the Supreme Court of the State of New York should be affirmed.

Respectfully submitted,

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APPENDIX A.

NEW YORK STATE PERSONAL INCOME TAX LAW Being Article 16 of the New York Tax Law (Ch. 60 of the Consolidated Laws), as added by Ch. 627, Laws of 1919, in effect May 14, 1919, and as amending Ch. 62, Laws of 1909, giving effect to amendments to the close of the legislative session of 1935.

ARTICLE 16*

Taxes Upon and With Respect to Personal Incomes

Section 350. Definitions.
351. Imposition of income tax.
351–a. Reimposition of tax against nonresidents.
351–c. Temporary increase of personal income tax.
351-d. Emergency tax on personal incomes; temporary. (1933).
351–e. Temporary emergency tax on personal net incomes. (1934).
351–f. Emergency tax on personal incomes. (1935).
352. Tax a debt.
353. Ascertainment of gain and loss.
354. Exchange of property.
355. Exchange of property when no gain or loss is realized.
356. Inventory.
357. Net income defined.
358. Computation of net income.

* Note: Sections 351-b, 351-c, 351-d, 351-e and 351-f, dealing with temporary emergency increases, have been omitted.

358-a. Installment basis.
359. Gross income defined.
360. Deductions.
361. Items not deductible.
362. Exemptions.
363. Credit for taxes in case of taxpayers other than residents of the state.
364. Partnerships.
365. Estates and trusts.
366. Information and payment at source.
367. Taxpayers' returns.
367–a. Returns in cases of changed residence.
368. Partnership returns.
369. Fiduciary returns.
370. Returns when accounting period changed.
371. Time and place of filing returns.
372. Administration of income tax law.
373. Powers of tax commissions.
373–a. Oaths and acknowledgments.
374. Revision and readjustment of accounts by tax commission.
375. Review of determination of tax commission by certiorari and regulations as to writ.
376. Penalties, additional taxes and interest.
377. When payable.
379. Collection of taxes; penalties and interest.
380. Warrant for the collection of taxes.
381. Action for recovery of taxes.
382. Distribution of the income tax.

383. Tax commission to make regulations and to collect facts.
384. Secrecy required of officials; penalty for violation.
385. Contract to assume income tax illegal.

§*350. Definitions.* For the purpose of this article and unless otherwise required by the context:

1. The word "comptroller" means the state comptroller.

2. The word "taxpayer" includes any person, trust or estate subject to a tax imposed by this article, or whose income is in whole or in part subject to a tax imposed by this article, and does not include corporations.

3. The words "military or naval forces of the United States" include the marine corps, the coast guard, the army nurse corps, female, and the navy nurse corps, female, but this shall not be deemed to exclude other units otherwise included within such words.

4. The words "taxable year" mean the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under this article. The words "fiscal year" mean an accounting period of twelve months, ending on the last day of any month other than December.

5. The word "fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, or any person, whether individual or corporate, act-

ing in any fiduciary capacity for any person, trust or estate.

6. The word "paid" for the purposes of the deductions and credits under this article, means "paid or accrued" or "paid or incurred," and the terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed, under this article. The term "received" for the purpose of the computation of net income under this article means "received or accrued" and the term "received or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this article.

7. The word "resident" applies only to natural persons and includes any person domiciled in the state, except a person who, though domiciled in the state, maintains no permanent place of abode within the state, but does maintain a permanent place of abode without the state, and who spends in the aggregate not to exceed thirty days of the taxable year within the state. In addition, it includes any person who maintains a permanent place of abode within the state and spends in the aggregate more than seven months of the taxable year within the state, whether or not domiciled in the state during any portion of said period, and such a person shall be taxed the same as though he had been domiciled in the state during the entire taxable year. A resident estate or trust includes an estate or trust created by or consisting of property of a person domiciled within the state or an estate of a deceased person who at the time of death was domiciled within the state.

8. The word "dividend" means any distribution made by a corporation out of its earnings or profits to its shareholders or members, whether in cash or in other property or in stock of the corporation, other than stock dividends as herein defined. "Stock-dividends" means new stock issued, for surplus or profits capitalized, to shareholders in proportion to their previous holdings.

9. The words "foreign country" or "foreign government" mean any jurisdiction other than one embraced within the United States. The words "United States" include the states, the territories of Alaska and Hawaii and the District of Columbia.

10. The words "withholding agent" include all individuals, corporations, associations and partnerships, in whatever capacity acting, including lessees, or mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of the state, or of any municipal corporation or political subdivision of the state, having the control, receipt, custody, disposal or payment, of interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments or other fixed or determinable annual or periodical gains, profits and income taxable under this article.

11. The word "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization; through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this chapter, a trust or estate or a corporation; and the word "partner" in-

cludes a member in such a syndicate, group, pool, joint venture, or organization.

§351. *Imposition of income tax.* A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined at rates as follows: Two per centum of the amount of net income not exceeding one thousand dollars; three per centum of the amount of net income in excess of one thousand dollars but not in excess of three thousand dollars; four per centum of the amount of net income in excess of three thousand dollars but not in excess of five thousand dollars; five per centum of the amount of net income in excess of five thousand dollars but not in excess of seven thousand dollars; six per centum of the amount of net income in excess of seven thousand dollars but not in excess of nine thousand dollars; seven per centum of the amount of net income in excess of nine thousand dollars; provided however, that the tax payable in any case where a return is required to be filed as a basis for taxation under this article shall not be less than two per centum of the net income computed as required by the several provisions of this article, except (a) that there shall be excluded from gross income gains and profits derived from any sale or exchange of real or personal property not connected with any trade or business carried on for gain or profit, and (b) there shall not be deducted losses sustained as the result of any sale or exchange of real or personal property not connected with any trade or business carried on for gain or profit; but, in computing such minimum tax, the personal and dependency exemptions specified in section three hundred sixty-two

8. The word "dividend" means any distribution made by a corporation out of its earnings or profits to its shareholders or members, whether in cash or in other property or in stock of the corporation, other than stock dividends as herein defined. "Stock-dividends" means new stock issued, for surplus or profits capitalized, to shareholders in proportion to their previous holdings.

9. The words "foreign country" or "foreign government" mean any jurisdiction other than one embraced within the United States. The words "United States" include the states, the territories of Alaska and Hawaii and the District of Columbia.

10. The words "withholding agent" include all individuals, corporations, associations and partnerships, in whatever capacity acting, including lessees, or mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of the state, or of any municipal corporation or political subdivision of the state, having the control, receipt, custody, disposal or payment, of interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments or other fixed or determinable annual or periodical gains, profits and income taxable under this article.

11. The word "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this chapter, a trust or estate or a corporation; and the word "partner" in-

cludes a member in such a syndicate, group, pool, joint venture, or organization.

§351. *Imposition of income tax.* A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined at rates as follows: Two per centum of the amount of net income not exceeding one thousand dollars; three per centum of the amount of net income in excess of one thousand dollars but not in excess of three thousand dollars; four per centum of the amount of net income in excess of three thousand dollars but not in excess of five thousand dollars; five per centum of the amount of net income in excess of five thousand dollars but not in excess of seven thousand dollars; six per centum of the amount of net income in excess of seven thousand dollars but not in excess of nine thousand dollars; seven per centum of the amount of net income in excess of nine thousand dollars; provided however, that the tax payable in any case where a return is required to be filed as a basis for taxation under this article shall not be less than two per centum of the net income computed as required by the several provisions of this article, except (a) that there shall be excluded from gross income gains and profits derived from any sale or exchange of real or personal property not connected with any trade or business carried on for gain or profit, and (b) there shall not be deducted losses sustained as the result of any sale or exchange of real or personal property not connected with any trade or business carried on for gain or profit; but, in computing such minimum tax, the personal and dependency exemptions specified in section three hundred sixty-two

of this chapter shall be allowed in full. A like tax is hereby imposed and shall be levied, collected and paid annually, at the rates specified in this section, upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state.

§*351-a. Reimposition of tax against nonresidents.* The tax provided for in section three hundred and fifty-one of this chapter, upon and with respect to income derived from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state, is hereby reimposed with respect to the taxable income for the calendar year nineteen hundred and nineteen and for any taxable year ending during the year nineteen hundred and nineteen, and for each year thereafter. Such tax shall be levied, collected and paid for the year nineteen hundred and nineteen, and returns with respect thereto shall be filed on or before June thirtieth, nineteen hundred and twenty, unless the time shall be extended as provided in this article.

§*352. Tax a debt.* Every tax imposed by this article, and all increases, interest and penalties thereon, in addition to being a tax against property, business, trade, profession or occupation, as in this article provided shall also become, from the time it is due and payable, a personal debt, from the person or persons liable to pay the same, to the state of New York.

[Renumbered by ch. 795, L. 1921. Former sec. 352 repealed by ch. 897, L. 1923, in effect June 1, 1923.]

§353. *Ascertainment of gain and loss.* 1. For the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal or mixed, the basis shall be, in case of property acquired on or after January first, nineteen hundred and nineteen, the cost thereof, or the inventory value if the inventory is made in accordance with this article.

2. In case of property acquired prior to January first, nineteen hundred and nineteen, and disposed of thereafter.

(a) No profit shall be deemed to have been derived if either the cost or the fair market price or value on January first, nineteen hundred and nineteen, exceeds the value realized.

(b) No loss shall be deemed to have been sustained if either the cost or the fair market price or value on January first, nineteen hundred and nineteen, is less than the value realized.

(c) Where both the cost and the fair market price or value on January first, nineteen hundred and nineteen, are less than the value realized, the basis for computing profit shall be the cost or the fair market price or value on January first, nineteen hundred and nineteen, whichever is higher.

(d) Where both the cost and the fair market price or value on January first, nineteen hundred and nineteen, are in excess of the value realized, the basis for computing loss shall be the cost or the fair market

price or value on January first, nineteen hundred and nineteen, whichever is lower.

3. In the case of property acquired by gift after December thirty-first, nineteen hundred twenty-seven, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift, except that for the purpose of determining loss the basis shall be the basis so determined on the fair market value of the property at the time of the gift, whichever is lower. If the facts necessary to determine the basis in the hands of the donor or the last preceding owner are unknown to the donee, the tax commission shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the tax commission finds it impossible to obtain such facts, the basis in the hands of such donor or last preceding owner shall be the fair market value of such property as found by the tax commission as of the date or approximate date at which, according to the best information that the tax commission is able to obtain, such property was acquired by such donor or last preceding owner.

4. In the case of property acquired by gift or transfer in trust on or before December thirty-first, nineteen hundred twenty-seven, gain or loss shall be determined as provided in subdivision one or two of this section, except that the word "cost" as used in said subdivisions shall be deemed to mean the fair market price or value of such property at the time of such acquisition. The provisions of this subdivision shall apply to the acquisition of property interests through the exercise of a power of appointment regardless of the time of acquisition.

5. If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death. For the purpose of this subdivision, property passing without full and adequate consideration under a general power of appointment exercised by will, shall be deemed to be property passing from the individual exercising such power by bequest or devise. In case such property has been appraised (a) pursuant to article ten, ten-a or ten-c of this chapter, or (b) for death tax purposes by the state or domicile of the transferor, or (c) for the purpose of the United States estate tax, the appraised value shall be presumed to be the fair market value at the date as of which the appraisal was made, but if appraised as of the same date for more than one of such purposes, the appraisal for the purpose first specified shall be presumed to be the fair market value.

6. In the case of property acquired by a partnership, if the basis is not otherwise determined under any of the subdivisions one to five, inclusive, of this section, the basis shall be the same as it would be in the hands of the transferor. If property so acquired by a partnership was distributed in kind to any partner, the

basis in the hands of such partner shall be such part of the basis in his hands of his partnership interest as is properly allocable to such property.

§354. *Exchange of property.* Upon the sale or exchange of property the entire amount of the gain or loss, determined under section three hundred and fifty-three of this article, shall be recognized, except as hereinafter provided in this section.

(1) No gain or loss shall be recognized if property held for productive use in trade or business or for investment (not including stock in trade or other property held primarily for sale, nor stocks, bonds, notes, choses in action, certificates of trust or beneficial interest, or other securities or evidences of indebtedness or interest) is exchanged solely for property of a like kind to be held either for productive use in trade or business or for investment, or if common stock in a corporation, is exchanged solely for common stock in the same corporation, or if preferred stock in a corporation is exchanged solely for preferred stock in the same corporation.

(2) No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(3) No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such cor-

poration, and immediately after the exchange such person or persons are in control of the corporation; but if the property thus transferred (other than stock in trade) is sold or otherwise disposed of by the corporation within the six months subsequent to such transfer, gain or loss to such person or persons shall be recognized as of the date of the exchange, the stock or securities received by such person or persons from the corporation being presumed in the absence of proof to the contrary in such case to be of the same value as the amount of the consideration received by the corporation on the subsequent sale or other disposition of such property; and it is further provided that in the case of an exchange by two or more persons this subdivision shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

(4) If property (as a result of its destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation, or the threat or imminence thereof) is compulsorily or involuntarily converted into property similar or related in service or use to the property so converted, or into money which is forthwith in good faith, under regulations prescribed by the tax commission, expended in the acquisition of other property similar or related in service or use to the property so converted, or in the acquisition of control of a corporation owning such other property, or in the establishment of a replacement fund, no gain or loss shall be recognized. If any part of the money is not so expended, the gain, if any, shall

be so recognized, but in an amount not in excess of the money which is not so expended.

(5) If there is distributed, in pursuance of a plan of reorganization, to a shareholder in a corporation a party to the reorganization, stock or securities in such corporation or in another corporation a party to the reorganization, without the surrender by such shareholder of stock or securities in such a corporation, no gain to the distributee from the receipt of such stock or securities shall be recognized.

(6) If an exchange would be within the provisions of subdivision (1), (2), or (3) of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such subdivision to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

(7) If an exchange would be within the provisions of subdivision (1), (2), or (3) of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such subdivision to be received without the recognition of gain or loss, but also of other property or money, then no loss from the exchange shall be recognized.

(8) As used in this section—

The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at

least a majority of the total number of shares of all other classes of stock of another corporation or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

As used in this section the term "control" means the ownership of at least eighty percentum of the voting stock and at least eighty percentum of the total number of shares of all other classes of stock of the corporation.

§355. *Exchange of property when no gain or loss is realized.* When property is exchanged for other property and no gain or loss is realized under the provisions of section three hundred and fifty-four, the property received shall be treated as taking the place of the property exchanged therefor.

§356. *Inventory.* Whenever in the opinion of the tax commission the use of inventories is necessary in

order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the tax commission may prescribe, conforming as nearly as may be to the best accounting practice in the trade or business and most clearly reflecting the income.

§357. *Net income defined.* The term "net income" means the gross income of a taxpayer less the deductions allowed by this article.

§358. *Computation of net income.* 1. The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year as the case may be); but if the taxpayer's annual accounting period is other than a fiscal year as defined in this article, or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year. Such net income shall be computed in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made upon such basis and in such manner as in the opinion of the tax commissioner does clearly reflect the income. In the case of the death of a taxpayer there shall be included in computing net income for the taxable period in which falls the date of his death, amounts accrued up to the date of his death if not otherwise properly includible in respect of such period or a prior period, and there shall be allowed for the same period amounts deductible under section three hundred and sixty of this chapter accrued up to the

date of his death if not otherwise properly allowable in respect of such period or a prior period.

2. If a taxpayer changes his accounting period from fiscal year to calendar year, from calendar year to fiscal year, or from one fiscal year to another, the net income shall, with the approval of the tax commission, be computed on the basis of such new accounting period, subject to the provisions of section three hundred and seventy.

§358-a. *Installment basis.* 1. A taxpayer who regularly sells or otherwise disposes of personal property on the installment plan may return as income therefrom in any taxable year that proportion of the installment payments actually received in that year which the total profit realized or to be realized when the payment is completed, bears to the total contract price. In the case (1) of a casual sale or other casual disposition of personal property (other than property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year), for a price exceeding one thousand dollars, or (2) of a sale or other disposition of real property, if in either case the initial payments do not exceed thirty per centum of the selling price (or, in case the sale or other disposition was in a taxable year beginning prior to January first, nineteen hundred thirty-five, the percentage of the selling price prescribed in the law applicable to such year), the income may be returned on the basis and in the manner above prescribed in this subdivision. As used in this subdivision the term "initial payments" means the payments receeived in cash or property other than evidences of

indebtedness of the purchaser during the taxable period in which the sale or other disposition is made, plus all payments made up to and at the time of transfer of title, provided that both the sale, or other disposition, and the transfer of title occurred in the same taxable period. The term "initial payments" shall not include evidences of indebtedness of the purchaser or amounts secured by the property sold or otherwise disposed of.

2. If a taxpayer entitled to the benefits of subdivision one of this section who has made returns on an accrual basis elects for any taxable year to report his net income on the installment basis, then in computing his income for the year of change or any subsequent year, amounts actually received during any such year on account of sales or other dispositions of property made in any prior year shall not be excluded.

3. If an installment obligation is satisfied at other than its face value or distributed, transmitted, sold, or otherwise disposed of, gain or loss shall result to the extent of the difference between the basis of the obligation and (1) in the case of satisfaction at other than face value or a sale or exchange—the amount realized, or (2) in case of a distribution, transmission, or disposition otherwise than by sale or exchange—the fair market value of the obligation at the time of such distribution, transmission, or disposition. Any gain or loss so resulting shall be considered as resulting from the sale or exchange of the property in respect of which the installment obligation was received. The basis of the obligation shall be the excess of the face value of the obligation over an amount equal to the income which would be returnable were the obligation satisfied

in full. This subdivision shall not apply to the transmission at death of installment obligations if there is filed with the tax commission, at such time as it may by regulation prescribe, a bond in such amount and with such sureties as it may deem necessary, conditioned upon the return as income, by the person receiving any payment on such obligations, of the same proportion of such payment as would be returnable as income by the decedent if he had lived and had received such payment.

§359. *Gross income defined.* The term "gross income":

1. Includes gains, profits and income derived from salaries, wages or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, *and whether situated within or without the state,* growing out of the ownership or use of or interest in such property; also from interest, rent, *(including rent derived from real property situated outside the state),* dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever, including gains or profits or income derived through estates or trusts by the beneficiaries thereof, whether as distributed or as distributable shares, *it being intended to include all of the foregoing items, without regard to the source thereof, location of the property involved, or any other factor, except only a case where the inclusion thereof would be violative of constitutional restrictions.* The amount of all such items shall be included in the gross income for the taxable year in which

received by the taxpayer, unless, under the methods of accounting permitted in this article, any such amounts are to be properly accounted for as of a different period; but

[Subd. 1 amended by L. 1935, ch. 933, § 1, in effect May 16, 1935. Matter in italics new. Section 2 of the 1935 act provides: "§2. This act shall be retroactive to January first, nineteen hundred nineteen."]

2. Does not include the following items which shall be exempt from taxation under this article:

a. Amounts received under a life insurance contract paid by reason of the death of the insured, whether in a single sum or otherwise, (but if such amounts are held by the insurer under an agreement to pay interest thereon, the interest payments shall be included in gross income),

b. Amounts received (other than amounts paid by reason of the death of the insured and interest payments on such amounts and other than amounts received as annuities) under a life insurance or endowment contract, but if such amounts (when added to amounts received before the taxable year under such contract) exceed the aggregate premiums or consideration paid (whether or not paid during the taxable year) then the excess shall be included in gross income. Amounts received as an annuity under an annuity or endowment contract shall be included in gross income; except that there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to three per centum of the aggregate premiums or consideration paid for such annuity (whether or not paid during such year), until the aggregate amount excluded from gross income under this article in respect of such annuity equals the ag-

gregate premiums or consideration paid for such annuity. In the case of a transfer for a valuable consideration, by assignment or otherwise, of a life insurance, endowment, or annuity contract, or any interest therein, only the actual value of such consideration and the amount of the premiums and other sums subsequently paid by the transferee shall be exempt from taxation under this section.

c. The value of property acquired by gift, bequest, devise or descent (but the income from such property shall be included in gross income).

d. Interest upon the obligations of the United States or its possessions; or securities issued under the provisions of the federal farm loan act of July seventeen, nineteen hundred and sixteen; or bonds issued by the war finance corporation; or the obligations of the state of New York or of any municipal corporation or political subdivision thereof; or investments upon which the tax provided for in section three hundred and thirty-one of this chapter has heretofore been paid since June first, nineteen hundred and seventeen, during the period of years for which such tax shall have been paid.

e. Any amount received through accident or health insurance or under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness, or through the war risk insurance act or any law for the benefit or relief of injured or disabled members of the military or naval forces of the United States.

n. The rental value of a dwelling house and appurtenances thereof furnished to a minister of the gospel as part of his compensation and occupied by him or his immediate family.

o. Income received during the taxable year as interest from the savings and loan bank of the state of New York upon bonds issued by it pursuant to the provisions of the banking law.

p. Salaries of judges and justices of any court in this state, and of official referees appointed pursuant to law, for any taxable year beginning prior to January first, nineteen hundred thirty-three.

3. In the case of taxpayers other than residents, gross income includes only the gross income from sources within the state, but shall not include annuities, interest on bank deposits, interest on bonds, notes or other interest bearing obligations or dividends from corporations, except to the extent to which the same shall be a part of income from any business, trade, profession or occupation carried on in this state subject to taxation under this article.

§360. *Deductions.* In computing net income there shall be allowed as deductions:

1. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, or in the production of income required to be included in gross income under this article, including a reasonable allowance for salaries or other compensation for personal services actually rendered, and including rentals or other payments re-

quired to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

2. All interest paid or accrued during the taxable year on indebtedness.

3. Taxes, other than estate, inheritance, legacy, succession, gift and income taxes, paid or accrued within the taxable year imposed, first, by the authority of the United States, or of any of its possessions, or, second, by the authority of any state, or territory, or any county, school district, municipality, or other taxing subdivision of any state or territory, not including those assessed against local benefits of a kind tending to increase the value of the property assessed, or, third, by the authority of any foreign government.

4. Losses sustained during the taxable year, and not compensated for by insurance or otherwise, if incurred in trade or business. The basis for determining the amount of the deduction under this subdivision or under subdivisions five and six of this section shall be the same as is provided in section three hundred and fifty-three of this chapter for determining the gain or loss from the sale or other disposition of property.

5. Losses sustained during the taxable year, and not compensated for by insurance or otherwise, if incurred in any transaction entered into for profit, though not connected with the taxpayer's trade or business; but in the case of a taxpayer other than a resident of the state, only as to such transactions in real property or

in tangible personal property having an actual situs within the state. Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions.

6. Losses sustained during the taxable year of property not connected with the trade or business (but, in case of a taxpayer other than a resident, only of real property or tangible personal property having an actual situs within the state) if arising from fires, storms, shipwrecks, or other casualty or from theft, and not compensated for by insurance or otherwise.

7. Debts ascertained to be worthless and charged off within the taxable year. In the case of a debt existing on January first, nineteen hundred and nineteen, no more than its fair market value on that date shall be deducted. A worthless debt arising since January first, nineteen hundred and nineteen, from unpaid wages, salary, rent, or any similar item of taxable income, is not an allowable deduction, unless the income which such item represents has been included as income by the taxpayer in a return rendered under this article.

8. A reasonable allowance for the exhaustion, wear and tear of property, the income from which is required to be included in gross income under this article, used in the trade or business, including a reasonable allowance for obsolescence. In case of property held by one person for life with remainder to another person, the deduction shall be computed as if the life tenant were the absolute owner of the property and shall be allowed to the life tenant. In the case of property

held in trust the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each.

9. In the case of mines, other natural deposits, except oil and gas wells, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon cost including cost of development not otherwise deducted; provided, that in the case of such properties acquired prior to January first, nineteen hundred and nineteen, the fair market value of the property (or the taxpayer's interest therein) on that date shall be taken in lieu of cost up to that date; provided, further, that in the case of mines discovered by the taxpayer on or after January first, nineteen hundred and nineteen, and not acquired as the result of a purchase of a proven tract or lease, where the fair market value of the property is materially disproportionate to the cost, the depletion allowance shall be based upon the fair market value of the property at the date of the discovery or within thirty days thereafter; but such depletion allowance based on discovery value shall not exceed fifty percentum of the net income of the taxpayer (computed without allowance for depletion) from the property upon which the discovery was made, except that in no case shall the depletion allowance be less than it would be if computed without reference to discovery value.

Discoveries shall include minerals in commercial quantities contained within a vein or deposit discover-

ed in an existing mine or mining tract by the taxpayer after January first, nineteen hundred and nineteen, if the vein or deposit thus discovered was not merely the uninterrupted extension of a continuing commercial vein or deposit already known to exist, and if the discovered minerals are of sufficient value and quantity that they could be separately mined and marketed at a profit.

In the case of oil and gas wells the allowance for depletion shall be twenty-seven and one-half per centum of the gross income from the property during the taxable year. Such allowance shall not exceed fifty per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance be less than it would be if computed without reference to this paragraph.

Such reasonable allowance in all the above cases to be made under rules and regulations to be prescribed by the tax commission. In the case of leases the deductions allowed by this subdivision shall be equitably apportioned between the lessor and lessee.

10. Contributions or gifts made within the taxable year to or for the use of:

(a) The United States, any state, territory or any political subdivision thereof, or the District of Columbia for exclusively public purposes:

(b) Any corporation, or trust, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to

children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, or to the special fund for vocational rehabilitation authorized by section twelve of the act of congress known as the world war veterans' act of nineteen hundred twenty-four;

(c) Posts or organizations of war veterans, or auxiliary units or societies of any such posts or organizations, if such posts, organizations, units, or societies are organized in the United States or any of its possessions, and if no part of their net earnings inures to the benefit of any private shareholder or individual; or

(d) A fraternal society, order, or association, operating under the lodge system, but only if such contributions or gifts are to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals; to an amount which in all the above cases combined shall not in the aggregate exceed fifteen per centum of the taxpayer's net income as computed without the benefit of this subdivision. Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the tax commission.

In the case of a taxpayer other than a resident of the state the deductions under this subdivision shall be allowed only as to contributions or gifts made to corporations or associations incorporated by or organized un-

der the laws of this state or to the vocational rehabilitation fund above mentioned or to this state or any political subdivision thereof for exclusively public purposes.

11. In the case of a taxpayer other than a resident of the state the deductions allowed in this section shall be allowed only if, and to the extent that, they are connected with income arising from sources within the state and taxable under this article to a nonresident taxpayer; and the proper apportionment and allocation of the deductions with respect to sources of income within and without the state will be determined under rules and regulations to be prescribed by the tax commission.

12. In the case of any taxpayer, the deductions permitted by subdivisions one and two of this section shall not be allowed if, and to the extent that, they are connected with the production of income from moneyed capital taxable under article two, and the proper apportionment and allocation of such deductions with respect to revenue derived from such moneyed capital and other income shall be determined under rules and regulations to be prescribed by the tax commission.

13. In the case of any taxpayer who is the owner of shares of stock in a corporation organized and existing exclusively for the purpose of owning and operating a cooperative multiple dwelling no part of the net earnings of which inures or is calculated or intended to inure to the benefit of any stockholder or individual, and all the expenses of which are paid annually by the stockholders in proportion to their owner-

ship, a deduction shall be allowed to such taxpayer as to the share of his payments for all taxes, other than franchise taxes, paid or accrued by such corporation during the taxable year, and all interest paid or accrued by such corporation during the taxable year on its indebtedness.

§361. *Items not deductible.* In computing net income no deduction shall in any case be allowed in respect of:

1. Personal, living, or family expenses;

2. Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate;

3. Any amount expended in restoring property or in making good the exhaustion thereof for which an allowance is or has been made; or

4. Premiums paid on any life insurance policy, covering the life of any officer or employee, or of any person financially interested in any trade or business carried on by the taxpayer, when the taxpayer is directly or indirectly a beneficiary under such policy.

5. Any amount otherwise allowable as a deduction which is allocable to income not required to be included in gross income for the purposes of this article, unless the tax commission by regulation shall allow the same. The tax commission shall have power to make regulations for the apportionment or allocation of such deductions as between income which would be required to be included in gross income under this article and income which would not be required to be so included.

§362. *Exemptions.* The following exemptions shall be allowed to any taxpayer:

1. In the case of a single person, a personal exemption of one thousand dollars, or in the case of the head of a family or a married person living with husband or wife, a personal exemption of two thousand five hundred dollars. A husband and wife living together shall receive but one personal exemption. If such husband and wife make separate returns, the personal exemption may be taken by either or divided between them.

2. Four hundred dollars for each person (other than husband or wife) dependent upon and receiving his chief support from the taxpayer, if such dependent person is under eighteen years of age or is incapable of self-support because mentally or physically defective.

3. If the status of the taxpayer, in so far as it affects the exemptions allowed by this section, changes during his taxable year, such exemptions shall be apportioned, under rules and regulations prescribed by the tax commission, in accordance with the number of months before and after such change. For the purposes of this paragraph a fractional part of a month shall be disregarded unless it amounts to more than half a month, in which case it shall be considered as a month.

§363. *Credit for taxes in case of taxpayers other than residents of the state.* Whenever a taxpayer other than a resident of the state has become liable to income tax to the state or country where he resides upon his net income for the taxable year, derived from

sources within this state and subject to taxation under this article, the tax commission shall credit the amount of income tax payable by him under this article with such proportion of the tax so payable by him to the state or country where he resides as his income subject to taxation under this article bears to his entire income upon which the tax so payable to such other state or country was imposed; provided that such credit shall be allowed only if the laws of said state or country (1) grant a substantially similar credit to residents of this state subject to income tax under such laws or (2) impose a tax upon the personal incomes of its residents derived from sources in this state and exempt from taxation the personal incomes of residents of this state. No credit shall be allowed against the amount of the tax on any income taxable under this article which is exempt from taxation under the laws of such other state or country. This section as amended shall apply to taxes for the year nineteen hundred and nineteen and each year thereafter.

§364. *Partnerships.* Individuals carrying on business in partnerships shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the partnership is computed, then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the fiscal or calendar year upon the basis of which the partner's net income is computed.

Taxpayers who are members of partnerships may be required by the tax commission to make a return stating the gross receipts and net gains or profits of the partnership for any taxable year. The net income of the partnership shall be computed in the same manner and on the same basis as provided in computing the net income of individuals except that the deduction provided in subdivision ten of section three hundred and sixty shall not be allowed and the personal exemptions provided for in section three hundred and sixty-two shall be allowed only to the individual partners.

§*365. Estates and trusts.* 1. The tax imposed by this article shall apply to estates and trusts, which tax shall be levied, collected and paid annually upon and with respect to the income of estates or of any kind of property held in trust, including:

a. Income received by estates of deceased persons during the period of administration or settlement of the estate;

b. Income accumulated in trust for the benefit of unborn or unascertained person or persons with contingent interests;

c. Income held for future distribution under the terms of the will or trust;

d. Income which pursuant to the terms of the trust is to be or may be applied to the payment of premiums upon life insurance or annuity contracts (except policies of insurance on the life of the trustor and annuities payable to the trustor and life insurance policies irrevocably payable for the purposes and in the man-

ner specified in subdivision ten of section three hundred sixty of this article, relating to the so-called "charitable contribution" deduction);

e. Income received during the liquidation of the assets of a corporation after its dissolution;

f. Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct; and

g. Income of an estate during the period of administration or settlement permitted by subdivision three to be deducted from the net income upon which the tax is to be paid by the fiduciary.

2. The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts, whether such income be taxable to the estate or trust or to the beneficiaries thereof. The net income of an estate or trust shall be computed in the same manner and on the same basis as provided in this article for individual taxpayers, except that there shall also be allowed as a deduction any part of the gross income which pursuant to the terms of the will or deed creating the trust, is paid to or held for the United States, any state, territory, or any political subdivision thereof, or the District of Columbia, or any corporation or association organized and operated exclusively for religious, charitable, scientific or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the bene-

fit of any private stockholder or individual; and except also that in a case under paragraph e of subdivision one of this section, in computing gain or loss on the sale, exchange or other disposition of the assets of a corporation that has been dissolved, the basis shall be the same is* if such assets had been acquired by the taxpayer at the same time, in the same manner and for the same consideration as they were acquired by the corporation which was dissolved, and had been owned from that time by the taxpayer; and in cases under paragraphs f and g of subdivision one of this section, the fiduciary shall include in the return a statement of each beneficiary's distributive share of such net income, whether or not distributed before the close of the taxable year for which the return is made.

3. In cases under paragraphs a, b, c, d and e of subdivision one of this section, the tax shall be imposed upon the estate or trust with respect to the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir or other beneficiary.

In such cases, the estate or trust shall be allowed the same exemptions as are allowed to single persons under section three hundred sixty-two of this chapter, and in such cases an estate or trust created by or consisting of property of a person not domiciled within the state, an estate of a deceased person who at the time of death was not domiciled within the state and

* So in original (evidently should be "as").

a trust resulting from the dissolution of a foreign corporation shall be subject to tax only to the extent to which individuals other than residents are liable under this article.

4. In cases under paragraphs f and g of subdivision one of this section, if the distribution of income of a resident estate or trust is in the discretion of the fiduciary, either as to the beneficiaries to whom payable or as to the amounts to which any beneficiary is entitled, the tax shall be imposed upon the estate or trust in the manner provided in subdivision three of this section, but without the deduction of any amounts of income paid or credited to any such beneficiary. In all other cases under paragraphs f and g of subdivision one of this section, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary his distributive share whether distributed or not, of the net income of the estate or trust for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the estate or trust is computed, then his distributive share of the net income of the estate or trust for any accounting period of such estate or trust ending within the fiscal or calendar year upon the basis of which such beneficiary's net income is computed. In such cases the income of a beneficiary not a resident, derived through such estate or trust, shall be taxable only to the extent provided in this article for individuals other than residents.

5. A trust created by an employer as a part of a stock bonus, pension or profit-sharing plan for the ex-

clusive benefit of some or all of his employees, to which contributions are made by such employer, or employees, or both, for the purpose of distributing to such employees the earnings and principal of the fund accumulated by the trust in accordance with such plan, shall not be taxable under this section, but any amount actually distributed or made available to any distributee shall be taxable to him in the year in which so distributed or made available to the extent that it exceeds the amounts paid in by him.

6. Where any part of the income of a trust pursuant to the terms thereof is to be or may be applied to the payment of premiums upon policies of insurance on the life of the trustor (except policies of insurance irrevocably payable for the purposes and in the manner specified in subdivision ten of section three hundred sixty of this article, relating to the so-called "charitable contribution" deduction), or to the payment of premiums upon annuity contracts payable to the trustor, such part of the income of the trust shall be included in computing the net income of the trustor.

7. Income of an estate or trust with respect to which the tax is imposed upon the estate or trust shall not be included in the gross income of a beneficiary when distributed.

§*366. Information and payment at source.* 1. For the calendar year nineteen hundred and twenty and for each calendar year thereafter, every withholding agent shall deduct and withhold from all salaries, wages, commissions, gratuities, emoluments, perquisites and other fixed or determinable annual or periodical com-

pensation of whatever kind and in whatever form paid or received, earned by any taxpayer for personal services and taxable under this article, of which he shall have control, receipt, custody, disposal or payment, the following amounts: Two percentum of the first one thousand dollars or less, three per centum of the next two thousand dollars or less, four per centum of the next two thousand dollars or less, five per centum of the next two thousand dollars or less, six per centum of the next two thousand dollars or less, seven per centum of the excess over nine thousand dollars, by which the amount of such compensation paid or to be paid in the calendar year, by such withholding agent to such taxpayer, exceeds the amount of the exemptions granted to such taxpayer under section three hundred and sixty-two of this chapter as shown by a certificate filed with the withholding agent in form to be prescribed by the tax commission or one thousand dollars if no certificate showing his personal exemption status is filed with the withholding agent by a taxpayer other than a resident of this state. If it appears that another state has passed a law taxing incomes in such manner as will result in its residents being entitled to credit under section three hundred sixty-three hereof, sufficient to offset all taxes imposed by this article, the tax commission may, by regulation, relieve residents of such state from being required to make any return under this article, and may prescribe a form of certificate to be filed by residents of such state with withholding agents.

A withholding agent with whom such a certificate shall be filed, or with whom a certificate, in such form as shall be prescribed by the tax commission, to the ef-

fect that the person entitled to such compensation is a resident of this state and setting forth his residence address, shall be filed after the beginning of the calendar year and before the time when he is required to make return and payment, need not deduct or withhold anything from the compensation of the person filing such certificate.

The tax commission may, by regulation, require withholding agents to forward to it at stated times any of the certificates mentioned in this subdivision.

2. Every withholding agent shall make return to the tax commission of complete information concerning the amount of all interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments or other fixed or determinable gains, profits and income, except interest coupons payable to bearer, of any taxpayer taxable under this article of one thousand dollars or more in any taxable year under such regulations and in such form and manner and to such extent as may be prescribed by the tax commission.

3. Every withholding agent required to make return of information under subdivision two of this section or required to deduct and withhold any tax under subdivision one of this section shall make return thereof on or before the fifteenth day of February in each year and every withholding agent required so to deduct and withhold any tax shall at the time of making such return pay the tax deducted and withheld to the tax commission. Every such withholding agent required so to deduct and withhold any tax is hereby

made liable for such tax and is hereby indemnified against the claims and demands of any individual, corporation or partnership for the amount of any payments made in accordance with the provisions of this section.

4. Income upon which any tax is required to be withheld at the source under this section shall be included in the return of the recipient of such income, but any amount of tax so withheld shall be credited against the amount of income tax as computed in such return.

5. If any tax required under this section to be deducted and withheld is paid by the recipient of the income, it shall not be recollected from the withholding agent; nor in cases in which the tax is so paid shall any penalty be imposed upon or collected from the recipient of the income or the withholding agent for failure to return or pay the same, unless such failure was fraudulent and for the purpose of evading payment.

§367. *Taxpayers' returns.* Every taxpayer having a net income for the taxable year (computed without reference to the capital gain and loss provisions contained in section three hundred fifty-one of this chapter) of one thousand dollars or over if single or if married and not living with husband or wife; or of two thousand five hundred dollars or over if married and living with husband or wife, or a gross income for the taxable year of five thousand dollars or over, regardless of the amount of his net income, shall make under oath a return stating specifically the items of his gross income and the deductions and credits allowed

by this article. For the purposes of this section any taxpayer other than a married person shall be deemed to be a single person. If a husband and wife living together have an aggregate net income computed as aforesaid (of two thousand five hundred dollars or over) or an aggregate gross income for such year of five thousand dollars or over, each shall make such a return, or the income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income. If the taxpayer is unable to make his own return the return shall be made by a duly authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer. A taxpayer other than a resident shall not be entitled to the deductions authorized by section three hundred sixty unless he shall make under oath a complete return of his gross income both within and without the state.

§367-a. *Returns in cases of changed residence.* If a taxpayer during the taxable year changes his status from that of a resident to that of nonresident, or from that of nonresident to that of resident, he shall file two returns, one as a resident covering the fraction of the year during which he was a resident, and one as a person other than a resident covering the fraction of the year during which he was a nonresident. The exemptions provided in section three hundred sixty-two of this article shall be divided ratably between the two returns so filed, according to time. In case two returns for one taxable year are filed as aforesaid, the taxes due thereon shall not be less than would be payable if the total net income shown by the two returns were included in a single return. If the aggregate of the tax

payer's net income from all sources during the fraction of the year in which he was a resident (computed without reference to the capital gain and loss provisions contained in section three hundred fifty-one of this chapter), and his net income (so computed) from sources within the state during the fraction of the year in which he was a nonresident, shall be less than one thousand dollars in the case of a taxpayer who is single, or married and not living with husband or wife, or under two thousand five hundred dollars in the case of a taxpayer who is married and living with husband or wife, no return shall be required under this section, unless the aggregate of the taxpayer's gross income from all sources during the fraction of the year in which he was a resident plus the aggregate of his gross income from sources within the state during the fraction of the year in which he was a nonresident is five thousand dollars or over, in which event returns shall be required.

§368. *Partnership returns.* Every partnership shall make a return for each taxable year, stating specifically the items of its gross income and the deductions allowed by this article, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net income if distributed and the amount of the distributive share of each individual. The return shall be sworn to by any one of the partners.

§369. *Fiduciary returns.* Every fiduciary (except receivers appointed by authority of law in possession of part only of the property of a taxpayer) shall make under oath a return for the individual or estate or trust for whom he acts, as follows:

1. If he acts for an individual whose entire income from whatever source derived is in his charge and the net income of such individual (computed without reference to the capital gain and loss provisions contained in section three hundred fifty-one of this chapter) is one thousand dollars or over if single or if married and not living with husband or wife, or two thousand five hundred dollars or over if married and living with husband or wife, or whose gross income for the taxable year is five thousand dollars or over, regardless of the amount of his net income.

2. If he acts (a) for an estate of a deceased person during the period of administration or settlement, whether or not the income of such estate during such period of administration or settlement is properly paid or credited to any legatee, heir or other beneficiary; (b) for an estate or trust the income of which is accumulated in trust for the benefit of unborn or unascertained persons, or persons with contingent interests; or (c) for an estate or trust the income of which is held for future distribution or is distributable in the discretion of the fiduciary under the terms of the will or trust; and the net income of such estate or trust (computed without reference to the capital gain and loss provisions contained in section three hundred fifty-one of this chapter) is one thousand dollars or over or the gross income for the taxable year is five thousand dollars or over, regardless of the amount of the net income.

3. If he acts (a) for an estate or trust the income of which is to be distributed to the beneficiaries periodically; or (b) as the guardian of an infant whose in-

come is to be held or distributed as the court may direct; and any beneficiary of such estate or trust or such infant receives or is entitled to a distributive share of the income of one thousand dollars or more. The return made by a fiduciary shall state specifically the items of the gross income and the deductions, exemptions and credits allowed by this article. Under such regulations as the tax commission may prescribe, a return made by one of two or more joint fiduciaries shall be a sufficient compliance with the above requirement. The fiduciary shall make oath that he has sufficient knowledge of the affairs of the individual, estate or trust for whom or which he acts to enable him to make the return, and that the same is, to the best of his knowledge and belief, true and correct.

Fiduciaries required to make returns under this article shall be subject to all the provisions of this article which apply to taxpayers.

§370. *Returns when accounting period changed.* If a taxpayer, with the approval of the tax commission, changes the basis of computing net income from fiscal year to calendar year, a separate return shall be made for the period between the close of the last fiscal year for which return was made and the following December thirty-first. If the change is made from calendar year to fiscal year, a separate return shall be made for the period between the close of the last calendar year for which return was made and the date designated as the close of the fiscal year. If the change is made from one fiscal year to another fiscal year, a separate return shall be made for the period between the close of the former fiscal year and the date designated as the close

of the new fiscal year. If a taxpayer making his first return for income tax keeps his accounts on the basis of a fiscal year, he shall make a separate return for the period between the beginning of a calendar year in which such fiscal year ends and the end of such fiscal year.

In all of the above cases the net income shall be computed on the basis of such period for which separate return is made, and the tax shall be paid thereon at the rate for the calendar year in which such period is included; and the exemptions allowed in this article shall be reduced respectively to amounts which bear the same ratio to the full exemptions provided for as the number of months in such period bears to twelve months.

§371. *Time and place of filing returns.* Returns shall be made to the tax commission on or before the fifteenth day of the fourth month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then the return shall be made on or before the fifteenth day of April in each year. The tax commission may grant a reasonable extension of time for filing returns whenever in its judgment good cause exists and shall keep a record of every such extension and the reason therefor. Except in the case of taxpayers who are abroad, no such extension shall be granted for more than six months. Such returns shall set forth such facts as the tax commission may deem necessary for the proper enforcement of this article. There shall be annexed to such return the affidavit or affirmation of the person making the return, to the effect that the statements contained therein are

true. Blank forms of return shall be furnished by the tax commission upon application, but failure to secure the form shall not relieve any taxpayer from the obligation of making any return herein required.

§372. *Administration of income tax law.* The state tax commission shall administer and enforce the tax herein imposed for which purpose it may divide the state into districts in each of which a branch office of the state tax commission may be maintained; provided that in no cases shall a county be divided in forming a district.

§373. *Powers of tax commission.* 1. If in the opinion of the tax commission, any return of a taxpayer is in any essential respect incorrect, it shall have power to revise such return, or if any taxpayer fails to make return as herein required, the tax commission is authorized to make an estimate of the taxable income of such taxpayer from any information in its possession, and to audit and state an account according to such revised return or the estimate so made by it for the taxes, penalties and interest due the state from such taxpayer. Except in the case of a wilfully false or fraudulent return with intent to evade the tax, the amount of tax due under any return shall be determined by the tax commission within three years after the return was made, or, in the case of a taxpayer assessed in nineteen hundred and twenty-three for moneyed capital under chapter eight hundred and ninety-seven of the laws of nineteen hundred and twenty-three upon which assessment the taxpayer has actually paid a tax in his tax district, within three years after the refund to the taxpayer of the amount of tax so paid, or any part there-

of, on his moneyed capital assessment and in such a case interest and penalties shall not accrue until thirty days shall have elapsed after the refund. In the case of such wilfully false or fraudulent returns the amount of tax due may be determined at any time after the return is filed and the tax may be collected at any time after it becomes due, and where no return has been filed the tax may be assessed at any time.

2. The tax commission, for the purpose of ascertaining the correctness of any return or for the purpose of making an estimate of taxable income of any person where information has been obtained, shall also have power to examine or to cause to have examined, by any agent or representative designated by it for that purpose, any books, papers, records or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take testimony and require proof material for its information, with power to administer oaths to such person or persons.

3. Where no questions of fact or law are involved and it appears from the records of the tax commission that any moneys have been erroneously or illegally collected from any taxpayer or other person, or paid by such taxpayer or other person under a mistake of facts, pursuant to the provisions of this article, the tax commission at any time shall have the power, upon making a record of its reasons therefor in writing, to cause such moneys so paid and being erroneously and illegally held to be refunded and to issue therefor its certifi-

cate to the comptroller as provided by subdivision four of section three hundred and seventy-seven of this chapter.

§373-a. *Oaths and acknowledgments.* Such officials and employees of the income tax bureau of the department of taxation and finance as may be designated by the tax commission by resolution recorded in its minutes, shall have the power to administer an oath to any person, or to take the acknowledgment of any person in respect of any income tax report or return required by or pursuant to this article, or the rules and regulations of the tax commission.

§374. *Revision and readjustment of accounts by tax commission.* If an application for revision be filed with the tax commission by a taxpayer within two years from the time of the filing of the return, or if the tax of such taxpayer shall have been recomputed, then within one year from the time of such recomputation, the tax commission shall grant a hearing thereon and if it shall be made to appear, upon any such hearing by evidence submitted to it or otherwise, that any such computation includes taxes or other charges which could not have been lawfully demanded, or that payment has been illegally made or exacted of any such amount so computed, the tax commission shall resettle the same according to law and the facts, and adjust the computation of taxes accordingly, and shall send notice of its determination thereon to the taxpayer.

§375. *Review of determination of tax commission by certiorari and regulations as to writ.* The determination of the tax commission upon any application made

to it by any taxpayer for revision and resettlement of any computation of tax as prescribed by this article, may be reviewed in the manner prescribed by and subject to the provisions of section one hundred and ninety-nine of this chapter. No certiorari to review any statement of a computation or any determination by the tax commission under this article shall be granted unless notice of application therefor is made within ninety days after the service of the notice of such determination. Eight days' notice shall be given to the tax commission of the application for such writ. Before making the application the full amount of the taxes, interest and other charges audited and stated in such determination must be deposited with the tax commission and an undertaking filed with the commission, in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that if such writ is dismissed or the determination of the tax commission affirmed, the applicant for the writ will pay all costs and charges which may accrue against him in the prosecution of the writ, including cost of all appeals, or at the option of the applicant such undertaking may be in a sum sufficient to cover the taxes, interest and other charges, audited and stated in such determination plus the costs and charges which may accrue against him in the prosecution of the writ, in which event the applicant shall not be required to pay such taxes, interest and other charges as a condition precedent to his application for the writ.

§*376. Penalties, additional taxes and interest.* 1. If any taxpayer, without intent to evade any tax imposed by this article, shall fail to make a return of income or pay any tax if one is due at the time required by or

under the provisions of this article, but shall voluntarily make a correct return of income and pay the tax due within sixty days thereafter, there shall be added to the tax an additional amount equal to five per centum thereof, but such additional amount shall in no case be less than two dollars, and an additional one per centum for each month or fraction of a month during which the tax remains unpaid.

If any withholding agent, without intent to evade any tax imposed by this article, shall fail to make a return and pay a tax withheld by him at the time required by or under the provisions of this article such withholding agent shall be liable for such tax and shall pay the same together with all penalties and interest charges thereon as provided in this subdivision or by subdivision two of this section and such additional amount of penalties and interest shall in no case be charged to or collected from the taxpayer by said withholding agent. The tax commission shall have the same rights and powers for the collection of such tax, penalties and interest against such withholding agent as are now prescribed by this article for the collection of a tax against an individual taxpayer.

2. If any taxpayer fails voluntarily to make a return of income or to pay a tax if one is due within sixty days of the time required by or under the provisions of this article, the tax, if it amounts to two dollars or more, shall be doubled, or if the tax is less than two dollars the sum of two dollars shall be added thereto, and the amount so determined shall be increased by one per centum for each month or fraction of a month from the time the tax was originally due to the date of payment.

3. Any individual, corporation or partnership, who, without fraudulent intent, shall fail to pay, or to deduct or withhold and pay any tax, or to make, render, sign or verify any return, or to supply any information, within the time required by or under the provisions of this article, shall be liable to a penalty of not more than five hundred dollars to be imposed, assessed and collected by the state tax commission in the same manner as is provided in this article with regard to taxes.

4. Any individual, corporation or partnership, or any officer or employee of any corporation, or member or employee of any partnership, who, with intent to evade any tax or any requirement of this article or any lawful requirement of the tax commission thereunder, shall fail to pay the tax, or to make, render, sign or verify any return, or to supply any information, within the time required by or under the provisions of this article, or who, with like intent, shall make, render, sign or verify any false or fraudulent return or statement, or shall supply any false or fraudulent information, shall be liable to a penalty of not more than one thousand dollars, to be recovered by the attorney-general, in the name of the people, by action in any court of competent jurisdiction, and shall also be guilty of a misdemeanor and shall, upon conviction, be fined not to exceed one thousand dollars or be imprisoned not to exceed one year, or both, at the discretion of the court.

5. The attorney-general shall have the power, with the consent of the tax commission, to compromise any penalty for which he is authorized to bring action un-

der subdivision four of this section. The penalty provided by subdivision four of this section shall be additional to all other penalties in this article provided.

6. The failure to do any act required by or under the provisions of this article shall be deemed an act committed in part at the office of the tax commission in Albany. The certificate of the tax commission to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied, as required by or under the provisions of this article, shall be *prima facie* evidence that such tax has not been paid, that such return has not been filed, or that such information has not been supplied.

§*377. When payable.* 1. Each taxpayer shall, or in cases where an agent or guardian or other fiduciary makes return for the taxpayer on whose behalf he is acting, then the agent, guardian or other fiduciary shall, at the time of filing his return, pay to the tax commission the amount of tax payable hereunder as the same shall appear from the face of the return; provided, however, that if one-half of the tax shall be paid on or before the last day for the filing of the return, one-fourth may be paid on or before two months from the date limited for the filing of the return, and the remaining one-fourth on or before six months from the date limited for the filing of the return, except in a case where the time for the making of the return has been extended for more than six months, when the entire tax shall be paid at one time. If any installment of the tax is not paid on or before the date limited for its payment, the whole amount of the tax unpaid, with penalties and interest as prescribed in section three

hundred seventy-six of this chapter, computed from the due date of the delinquent installment, shall immediately become due and payable. If the time for filing the return shall be extended, there shall be paid, in addition to the tax, interest thereon at the rate of six per centum per annum for the period for which the extension was granted, which interest shall become due at the same time the tax itself becomes due. If the time for filing a return by a withholding agent shall be extended, the withholding agent shall pay interest as specified in the preceding sentence, and may not charge the same to the taxpayer.

2. As soon as practicable after the return is filed, the tax commission shall examine it and compute the tax.

3. If the amount of tax as computed shall be greater than the amount set forth in the return, the excess shall be paid by the taxpayer to the tax commission within ten days after the amount of the tax as computed shall be mailed by the tax commission. In such case, if the return is made in good faith and the understatement of the amount in the return is not due to any fault of the taxpayer, there shall be no interest, penalty or additional tax because of such undersatement, provided the deficiency be paid within ten days after notice of the amount be mailed to the taxpayer. If payment be not made within ten days, there shall be added to the amount of the deficiency five per centum thereof, and, in addition, interest at the rate of one per centum per month for each month or fraction of a month calculated from the date of the notice, and any unpaid installment of the amount set forth in the

return shall immediately become due and payable, together with penalties and interest as prescribed under section three hundred seventy-six of this chapter, computed from the date of such notice. If the understatement is due to negligence on the part of the taxpayer but without intent to defraud, there shall be added to the amount of the deficiency five per centum thereof, and in addition, interest at the rate of one per centum per month for each month or fraction of a month. If the understatement is false or fraudulent with intent to evade the tax, the tax on the additional income discovered to be taxable shall be doubled and an additional one per centum shall be added to the amount so due for each month or fraction of a month. Except as otherwise provided in this subdivision, the interest provided for in this subdivision shall in all cases be computed from the date the tax was originally due to the date of payment.

4. If the amount of tax as computed shall be less than the amount set forth in the return any amount that has been paid in excess of the amount that would have been due if the return had correctly set forth the amount of tax shall be allowed as a credit against any unpaid installments, or, if there be no unpaid installments, or if the amount to be credited exceeds the unpaid installments, an appropriate refund shall be made by the comptroller out of the proceeds of the tax retained by him as provided in this article. Such refund shall be made only upon a certificate of the commission approved by the comptroller. The comptroller, as a condition precedent to the approval of such a certificate, may examine into the facts as disclosed by the income tax return and the other information and data available in the files of the commission.

§379. *Collection of taxes; penalties and interest.* 1. The tax commission is authorized at its discretion to designate agents for the purpose of collecting income taxes and shall require from them reasonable bond.

2. The tax commission shall have the power, in its discretion, to suspend the accruing of all penalties upon any additional tax assessed by virtue of the provisions of section three hundred and seventy-seven of this chapter and to extend the time for payment of such assessment in any case where due application has been made for a revision and readjustment of the same under section three hundred and seventy-four of this chapter to not later than thirty days after the service of the notice of a determination thereon, and, upon making a record of its reasons therefor, to waive or reduce any of the additional taxes or interest provided in section three hundred and seventy-six, subdivisions one and two, and section three hundred and seventy-seven, subdivision three, of this article, or to compromise the same.

§380. *Warrant for the collection of taxes.* If any tax imposed by this article or any portion of such tax be not paid within sixty days after the same becomes due, the tax commission shall issue a warrant under its official seal directed to the sheriff of any county of the state commanding him to levy upon and sell the real and personal property of the person owning the same, found within his county, for the payment of the amount thereof, with the added penalties, interest and the cost of executing the warrant, and to return such warrant to the tax commission and pay to it the money collected by virtue thereof within sixty days after the receipt of such warrant.

The sheriff shall within five days after the receipt of the warrant, file with the clerk of his county a copy thereof, and thereupon the clerk shall enter in the judgment docket, in the column for judgment debtors the name of the taxpayer mentioned in the warrant, and in appropriate columns the amount of the tax or portion thereof and penalties for which the warrant is issued and the date when such copy is filed, and thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real property or chattels real of the person against whom it is issued in the same manner as a judgment duly docketed in the office of such clerk. The said sheriff shall thereupon proceed upon the same in all respects, with like effect, and in the same manner prescribed by law in respect to executions issued against property upon judgments of a court of record, and shall be entitled to the same fees for his services in executing the warrant, to be collected in the same manner. In the discretion of the tax commission a warrant of like terms, force and effect may be issued and directed to any agent authorized to collect income taxes, and in the execution thereof such agent shall have all the powers conferred by law upon sheriffs, but shall be entitled to no fee or compensation in excess of actual expenses paid in the performance of such duty. If a warrant be returned not satisfied in full, the tax commission shall have the same remedies to enforce the claim for taxes against the taxpayer as if the people of the state had recovered judgment against the taxpayer for the amount of the tax. The tax commission, if it finds that the interests of the state will not thereby be jeopardized, and upon such conditions as it may exact, may release any real property or chattels real from the

lien of any warrant for unpaid taxes filed pursuant to this section, and such release may be recorded in the office of any recording officer in which such warrant has been filed.

§381. *Action for recovery of taxes.* Action may be brought at any time by the attorney-general of the state at the instance of the tax commission, in the name of the state to recover the amount of any taxes, penalties and interest due under this article.

§382. *Distribution of the income tax.* All revenue collected or received by the commission under this article shall be deposited daily with such responsible banks, banking houses or trust companies as may be designated by the comptroller, and to the credit of the comptroller of the state of New York. Such deposits shall be kept separate and apart from all other moneys in the possession of the comptroller. The comptroller shall require adequate security from all such depositories. Of the revenue collected under this article the comptroller shall retain in his hands sufficient to provide at all times a fund in his hands in the sum of two hundred fifty thousand dollars out of which he shall pay any refunds to which taxpayers shall be entitled under the provisions of this article. Of the remainder, there shall be paid into the state treasury to the credit of the general fund a sum equal to the penalties and interest included in the revenue collected or received as aforesaid and the balance remaining after making the payments hereinafter provided for. Not later than the first day of July, and in case of moneys subsequently collected at least quarterly thereafter, there shall be distributed and

paid to the treasurers of the several counties of the state, fifty per centum of the revenue that would have been collected or received under this article (exclusive of penalties and interest and not including any revenues under sections three hundred fifty-one-c, three hundred fifty-one-d, three hundred fifty-one-e and three hundred fifty-one-f of this chapter) if the rates of tax imposed hereunder on net income had remained as follows: One per centum of the amount of net income not exceeding ten thousand dollars, two per centum of the amount of net income in excess of ten thousand dollars but not in excess of fifty thousand dollars; three per centum of the amount of net income in excess of fifty thousand dollars without the provision for minimum taxes. Such distribution shall be made in the proportion that the assessed valuation of the real property of each county bears to the aggregate assessed valuation of the real property of the state. The tax commission shall in due time for the distribution thereof certify to the comptroller the apportionment to the various counties of the share of taxes received under this article to which they are entitled and upon verification and approval of such apportionment by him the comptroller shall distribute such share of the tax moneys in accordance with the provisions of this article. As to any county included in the city of New York such payment shall be made to the receiver of taxes in such city and be paid into the general fund for the reduction of taxation of the city of New York. The county treasurer shall apportion the amount so received among the several towns and cities within the county, except a city containing a part of a town, in proportion that the assessed valuation of the real property of each town or city bears

to the aggregate assessed valuation of the real property of the county. The county treasurer shall pay the amount so apportioned to each city to the chief fiscal officer of the city to be paid into the general fund for city purposes; and in a county having more than three towns and adjoining a city of the first class having a population of one million and upwards, the county treasurer shall pay the amount so apportioned to the supervisor of the town and such amount shall be by him credited to general town purposes, and such amounts shall not be apportioned or distributed as hereinafter provided. If a town does not contain any part of a city or village, the county treasurer shall pay the amount so apportioned to the town to the supervisor of the town. If one or more incorporated villages or cities be wholly or partly within a town, the county treasurer shall divide the amount apportioned to such town between such town and such village, villages or city in the proportions that the assessed valuations of the real property of such town, as appears by the last preceding town assessment-roll, and of the real property of such village, villages or city, or the portion thereof wholly within such town, as appears by the last preceding village or city assessment-roll, bear respectively to the aggregate assessed valuation of the real property of such town and of such village, villages or city, determined by adding together the assessed valuation of the real property of the town, as appears by the last preceding town assessment-roll and the assessed valuation of the real property of such village, villages or city, or the portion thereof wholly within such town, as appears by the last preceding village or city assessment-roll, as the case may be. If two or more villages be entitled to

share in such division, the county treasurer shall divide between them the amount to which they are entitled in the proportions that the assessed valuation of the real property of such villages located in the town, as appears by the last preceding village assessment-rolls bears to the aggregate assessed valuations of the real property of such villages located in such town, as so determined. Except that if one or more incorporated villages or cities be wholly or partly within a town and such town be in a county adjacent to a city of the first class and such county has within it not more than three towns, the county treasurer of such county shall divide the amount apportioned to such town between such town and such village, villages or city or the portion thereof wholly within such town, in the proportion that the assessed valuation of the real property of each such village or city respectively or part thereof in such town, as the same appears upon the last preceding assessment-roll used for state and county tax purposes, bears to the aggregate assessed valuation of the real property of the entire town as appears upon the last preceding assessment-roll used for state and county tax purposes. The county treasurer shall pay over to the chief fiscal officer or officers of such village or villages or such city the amount to which such village, villages or city is entitled in accordance with the above apportionment, and shall pay the remaining portion thereof to the supervisor of the town. Except as hereinafter provided, upon the distribution of such revenues to any town the supervisor shall, with the approval of the town board, distribute not to exceed one-third of such allotment to such town among the several school districts in the towns in the proportions that the assessed valuation of the real

property of each of such school districts, respectively, or part thereof in such town as the same appears upon the last preceding town assessment-roll bears to the aggregate assessed valuation of the real property of the entire town, but the amount so distributed to any school district for any one year shall not exceed one-fourth of the amount raised by taxation in such school district for school purposes during the preceding year, and the excess, if any, not so distributed to any such district shall be retained by the supervisor and credited, together with the remaining two-thirds of such total allotment, to general town purposes. However, the town board, by resolution, may direct the supervisor to retain all such moneys allotted to the town, in which case such one-third shall not be so distributed to the school districts, but all moneys so allotted to the town shall be credited to general town purposes.

§383. *Tax commission to make regulations and to collect facts.* The tax commission is hereby authorized to make such rules and regulations, and to require such facts and information to be reported, as it may deem necessary to enforce the provisions of this article. Rules and regulations of the comptroller in force when this section as amended takes effect shall continue in force as the rules and regulations of the tax commission until amended or repealed by the tax commission.

§384. *Secrecy required of officials; penalty for violation.* 1. Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the tax commission, any tax commissioner, agent, clerk, or other officer or employee

to divulge or make known in any manner the amount of income or any particulars set forth or disclosed in any report or return required under this article. The officers charged with the custody of such reports and returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the tax commission, in an action or proceeding under the provisions of this chapter, to which it is a party, or on behalf of any party to any action or proceeding under the provisions of this article when the reports or facts shown thereby are directly involved in such action or proceeding, in either of which events the court may require the production of, and may admit in evidence, so much of said reports or of the facts shown thereby, as are pertinent to the action or proceeding and no more. Nothing herein shall be construed to prohibit the delivery to a taxpayer or his duly authorized representative of a certified copy of any return or report filed in connection with his tax nor to prohibit the publication of statistics so classified as to prevent the identification of particular reports or returns and the items thereof, or the inspection by the attorney-general or other legal representatives of the state of the report or return of any taxpayer who shall bring action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted in accordance with the provisions of sections three hundred and eighty and three hundred and eighty-one of this chapter. Reports and returns shall be preserved for three years and thereafter until the tax commission orders them to be destroyed.

2. Any offense against subdivision one of this section shall be punished by a fine not exceeding one thousand dollars or by imprisonment not exceeding one year, or both, at the discretion of the court, and if the offender be an officer or employee of the state he shall be dismissed from office and be incapable of holding any public office in this state for a period of five years thereafter.

3. Notwithstanding the provisions of this section, the tax commission may permit the commissioner of internal revenue of the United States, or the proper officer of any state imposing an income tax upon the incomes of individuals, or the authorized representative of either such officer, to inspect the income tax returns of any individuals, or may furnish to such officer or his authorized representative an abstract of the return of income of any individual or supply him with information concerning any item of income contained in any return, or disclosed by the report of any investigation of the income or return of income of any individual; but such permission shall be granted or such information furnished to such officer or his representative only if the statutes of the United States or of such other state, as the case may be, grant substantially similar privileges to the proper officer of this state charged with the administration of the personal income tax law thereof.

§385. *Contract to assume income tax illegal.* It shall be unlawful for any person to agree or contract directly or indirectly to pay or assume or bear the burden of any tax payable by any taxpayer under the provisions of this article. Any such contract or agreement shall be null and void and shall not be enforced or given effect by any court.

APPENDIX B.

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THE NATURE OF THE INCOME TAX

By ROBERT C. BROWN*

With the income tax a settled and important part of the fiscal system of the federal government and of an increasing number of states, the importance of a thorough understanding of the various ramifications of this tax is clearly apparent. The literature on this subject, both official and unofficial, is enormous; yet we have little discussion of the precise nature of the tax. It is the purpose of this article to consider this question.

The problem of ascertaining the nature of this or any other tax is primarily of seeing whether it fits into the accepted categories of taxation, and if so where. What these accepted categories are is not doubtful. Cooley[1] states that there are three kinds of taxes, as follows: (1) capitation or poll taxes, (2) taxes on property, and (3) excise taxes. This classification would be generally accepted.[2] But curiously enough, two early state cases[3] in classifying taxes omitted excise taxes and substituted income taxes. It is obvious that such a classification will not do now, though this

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[1] Cooley, Taxation, 4th ed., sec. 38.
[2] See, Taxation, 26 R. C. L. 34.
[3] Savannah v. Hartridge, (1850) 8 Ga. 23; Glasgow v. Rowse, (1869) 43 Mo. 479.

early segregation of income taxes as a separate class may possibly throw some light upon their real nature.

Our problem, then, is to determine whether the income tax is a capitation tax, a property tax, an excise tax, or a tax falling into none of these categories and therefore *sui generis*. As will shortly appear, this is a question which has received comparatively few direct answers, and these few decidedly conflicting.[4] Where a court feels able to do so, it generally refrains from deciding the problem of the nature of the income tax.[5] One of the most recent writers on an income tax problem involving this question admits the present uncertainty as to the nature of this form of taxation.[6]

It must not be thought, however, that this is a purely theoretical question. It is of immediate practical importance in at least two classes of income tax problems. The first of these is as to the allocation of income for taxation purposes between states. It is true that the answer to this problem does not depend entirely upon the nature of the tax,[7] but when domicile, property and business activities are separated into different states, it is obviously quite important which of these is regarded as the basis of the tax. Also the matter is important in connection with the usual constitutional requirements for property taxes, of equality and uniformity.[8] If the income tax is a property tax, it would usually involve double taxation of the property from which the income is derived, and its

[4] See 4 Cooley, Taxation, 4th ed., secs. 1743, 1745; also Taxation, 26 R. C. L. 142.
[5] Shields v. Williams, (1929) 159 Tenn. 349, 19 S. W. (2d) 261.
[6] See Huston, Allocation of Corporate Net Income for Purposes of Taxation, (1932) 26 Ill. L. Rev. 725.
[7] See Rottschaefer, State Jurisdiction of Income for Tax Purposes, (1931) 44 Harv. L. Rev. 1075. See also Huston, Allocation of Corporate Net Income for Purposes of Taxation, (1932) 26 Ill. Rev. 725.
[8] See Rottschaefer, A State Income Tax and the Minnesota Constitution, (1928) 12 Minnesota Law Review 683.

exemptions and graduated rates would run it into serious danger of conflict with such constitutional provisions. It follows that, in these connections at least, the problem of the nature of the income tax is of practical as well as theoretical importance.

The Income Tax as a Personal Tax

The most obvious method to attack our problem is to consider each of the above-mentioned accepted categories of taxes, and to ascertain whether the income tax can be fitted into it. The first of these categories is the capitation or poll tax, which is levied upon the taxpayer simply because he is a human being subject to the jurisdiction of the taxing power. It is thus a personal tax in the strictest sense.

Obviously the income tax does not fit here. In the first place, a capitation tax is uniform,[9] and an income tax is intentionally made far from uniform both in application and rate. It is not surprising, therefore, that a claim that an income tax was a poll tax was rejected without discussion by the supreme court of Georgia.[10]

The same argument was treated with little more consideration by the federal Supreme Court, when it decided in *Shaffer v. Carter*,[11] that a state may levy an income tax upon a non-resident with respect to property owned and business transacted within the state. The taxpayer argued that the income tax was a purely personal tax, and so could not be levied upon non-

[9] 1 Cooley, Taxation, 4th ed., sec. 40.
[10] Featherstone v. Norman, (1930) 170 Ga. 370, 153 S. E. 58.
[11] (1920) 252 U. S. 37, 40 Sup. Ct. 221, 64 L. Ed. 445.

residents. The Court brushed aside this argument with the rather contemptuous remark that this was a mere matter of the definition of the tax, and so not worthy of consideration. But it is respectfully submitted that this matter of definition was the very point on which this aspect of the case turned. Jurisdiction to impose a personal tax depends on the domicile of the taxpayer.[12] Since the Court decided that the tax could be imposed against a non-resident, it necessarily held that an incmoe tax is not a personal tax.

But that an income tax has certain rather definite analogies to a personal tax is apparent from the decision in *Cook v. Tait*,[13] which holds that a federal income tax can be imposed upon a United States citizen residing in Mexico, and holding no property and transacting no business in this country. The decision seems abundantly sensible, since the taxpayer was undoubtedly receiving protection and other advantages as an American citizen; otherwise he would presumably have become a Mexican citizen.[14] Yet no property or excise tax could have been levied by the United States, since the taxpayer held no property and transacted no business within its jurisdiction.

The tax sustained in this case cannot be regarded as strictly a personal tax, since it depends upon nationality rather than domicile. Yet the analogy is certainly close, and it would seem that this doctrine would permit a state to collect an income tax from any of its citizens residing in another state, merely by reason of citizenship in the state imposing the tax. The

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[12] 4 Cooley, Taxation, 4th ed., sec. 1777.
[13] (1924) 265 U. S. 47, 44 Sup. Ct. 444, 68 L. Ed. 895.
[14] See Levitt, Income Tax Predicated upon Citizenship: Cook v. Tait, (1925) 11 Va. L. Rev. 607.

court, however, by way of dictum, expressed the opinion that this could not be done, obviously relying on the provision of the federal constitution that, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens . . . of the state wherein they reside."[15] It would appear from this that it would be legally impossible for a person to be a citizen of a state other than that where he resides. However, the Court has held otherwise, stating that residence and citizenship are not the same for all purposes.[16]

This question must be left unsettled; at any rate, it is not of immediate importance in our problem. But we can conclude with confidence that the income tax, while having considerable analogy to a personal tax, cannot be put into this category.

The Income Tax as a Property Tax

The next category into which we must attempt to fit our subject is the property tax. Here we are confronted with two possibilities. It might be contended that an income tax is really a tax upon the property from which the income is derived; or it may be that the income itself is the property which is taxed. If either of these hypotheses can be sustained, the income tax may be regarded as a property tax.

The first of these assumptions, that the tax is upon the property from which the income is derived, is subject to obvious objections. It may do well enough with

[15] Fourteenth amendment, section 1.
[16] Douglas v. New York, etc., R. Co., (1929) 279 U. S. 377, 49 Sup. Ct. 355, 73 L. Ed. 747.

respect to such income as is in fact derived from property in the usual sense, though, as already shown, that is apt to lead to difficulties with state constitutional requirements of equality and uniformity. But what of income earned by the personal efforts of the taxpayer? Here there is no property from which the income is derived, unless it be the taxpayer's earning power; and it is certainly stretching the usual conception to call this property. But even if this difficulty can be surmounted, a more serious one remains. In theory at least, and to a large extent in practice, property is taxed according to its actual value, not according to what it actually produces. A vacant lot is taxed although it produces no revenue and even though it is an expense to its owner to maintain it. No doubt earning power is an important element in the value of property; but the actual earnings, being largely within the control of the owner, are not regarded as decisive on this point. But if this income tax is imposed upon the taxpayer's earning power as property, all of these elementary principles are set at naught. If the taxpayer earns nothing because he does not work or because of other contingencies, he pays nothing, though his earning power is enormous; if, on the other hand, he, through good fortune, receives a greater income than would be justified by his earning power, he must pay a tax on this whole income. It is submitted, therefore, that the conception of a general income tax as a tax upon the property from which the income is derived is an absurd and impossible one.

Yet few readers will need to be reminded that the United States Supreme Court has decided that an income tax is a direct tax upon property from which the

income is derived. The case referred to is, of course, *Pollock v. Farmers' Loan & Trust Co.*, which held unconstitutional as a direct and unapportioned tax, the federal income tax attempted to be imposed in 1894. On the first hearing[17] the court held the law unconstitutional so far as it purported to tax rents received from land, on the theory that this was a direct tax on that land. The Court was evenly divided as to the validity of the tax so far as it covered income from personal property; so this point was reargued. But at this second hearing[18] the majority of the Court took the position that this too was invalid, on the ground that a tax on the income from personal property is in effect a tax upon that property, and so cannot be levied by the federal government without apportionment.

The Court, believing that the invalidating of these portions of the income tax would cause the whole scheme to fail, declared the entire income tax unconstitutional. It did not, however, purport to overrule *Springer v. United States*,[19] which had sustained a general income tax imposed by the federal government during the Civil War period, but distinguished that case on the ground that there the taxpayer had not shown that he received any income from property.

The *Pollock Case* certainly enunciated revoluntionary doctrine, and it received then and long after equally violent criticism, though it may be doubted whether its doctrine was ever more vigorously or effectively attacked than in the numerous dissenting opinions in

[17](1895) 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759.
[18](1895) 158 U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108.
[19](1880) 102 U S. 586, 26 L. Ed. 253. The Court in this case relied on the very early case of Hylton v. United States, (1796) 3 Dall. 171, 1 L. Ed. 169, where the opinion was expressed that the only direct taxes within the meaning of the constitution were capitation and land taxes.

the case itself. But it is hardly worth while for us to consider the soundness of the doctrine. Sound or not, there it is. And it still stands as constitutional doctrine, notwithstanding the Sixteenth Amendment, for the Court has repeatedly insisted that that amendment did not give the federal government the power to impose an income tax or make it indirect; but it merely removed the necessity of apportioning the income tax, which, however, remains a direct tax.[20] The *Pollock Case* remains a very important authority with respect to our problem, for if an income tax is direct it is so only because it is a tax upon the property from which the income is derived, and so a property tax.

It is obvious also that the same doctrine is applicable to state taxes, at least so far as the nature of the tax is concerned; and the Supreme Court has recognized this, by holding that a state may tax a non-resident on income derived by him from property within the state.[21] The Court has also said that a state may tax the net income of property as well as the net income of its owner.[22] And the numerous authorities invalidating state income taxes which burden income derived from federal securities, or the federal income tax when it includes income from state securities are also authorities that an income tax is, in its nature, at least partly a property tax imposed upon the property from which the income is derived.[23]

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[20]Brushaber v. Union Pacific R. Co., (1916) 240 U. S. 1, 36 Sup. Ct. 236, 60 L. Ed. 493; Evans v. Gore, (1920) 253 U. S. 245, 40 Sup. Ct. 550, 64 L. Ed. 887; Miles v. Graham, (1925) 268 U. S. 501, 45 Sup. Ct. 601, 69 L. Ed. 1067.

[21]Shaffer v. Carter (1920) 252 U. S. 37, 40 Sup. Ct. 221, 64 L. Ed. 445. See also DeGanay v. Lederer, (1919) 250 U. S. 376, 39 Sup. Ct. 524, 63 L. Ed. 1042

[22]Atlantic Coast Line v. Doughton, (1923) 262 U. S. 413, 43 Sup. Ct. 620, 67 L. Ed. 1051.

[23]See Brown, Restrictions on State Taxation Because of Interference with Federal Functions, (1931) 17 Va. L. Rev. 325.

In general, however, the states have not accepted this doctrine. Massachusetts alone seems to have accepted it in full. The Massachusetts court has regularly held that the state income tax is a property tax imposed upon the property from which the income is derived, and so is subject to the limitations imposed by the state constitution upon the levy of property taxes.[24] As the court says in *Hart v. Tax Commission*:[25]

> "It follows that our income tax is not . . an excise. . . . In this respect it may differ from the federal income tax, which apparently in some aspects and applications may be an excise. . . . Nor is it a personal tax. Accordingly, the doctrine of '*mobilia personam sequuntur*' has no application. It is laid directly on the income of property, and as already stated is in reality a tax on the property itself."[26]

But even the Massachusetts court is not wholly consistent on this point. In *Wilcox v. County Commissioners*,[27] the court held that a resident of Medford who carried on business in Boston, where he was taxed on his stock-in-trade, might be subjected to an income tax in Medford. It was held that the Medford income tax was not on the stock-in-trade, though the income was derived from it, the court saying as to such income:

> "It is the net result of many combined influences: the use of the capital invested; the personal labor and services of the members of the firm; the skill and ability with which they lay in, or from time to time renew, their stock; the carefulness and good judgment with which they sell and give

[24] Opinion of the Justices, (1915(220 Mass. 613, 108 N. E. 570; Maguire v. Tax Commissioner, (1918) 230 Mass. 503, 120 N. E. 162, affirmed in Maguire v. Trefry, (1920(253 U. S. 12, 40 Sup. Ct. 417, 64 L. Ed. 739; Trefry v. Putnam, (1917) 227 Mass. 522, 116 N. E. 904. But see, Eaton, etc., Co. v. Commonwealth, (1921) 237 Mass. 523, 130 N. E. 99.

[25] (1921) 240 Mass. 37, 132 N. E. 621.

[26] (1921) 240 Mass. 37, 39, 132 N. E. 622.

[27] (1870) 103 Mass. 544.

> credit; and the foresight and address with which they hold themselves prepared for the fluctuations and contingencies affecting the general commerce and business of the country. To express it in a more summary and comprehensive form, it is the creation of capital, industry, and skill."[28]

It may be added that this seems a perfect demonstration that an income tax cannot properly be regarded as a mere tax upon the property from which the income is derived.

The court has also held that money in the bank is subject to a general property tax, although such money was derived from a source which is exempt from an income tax.[29] If an income tax is a property tax, it would seem that exemption from income tax should involve exemption from other property taxes.

But the Massachusetts court has adhered to its theory that an income tax is a tax upon the property from which the income is derived, notwithstanding the amendment to the state constitution intended to remove most restrictions from the legislative power to impose income taxes. It has therefore recently held that since property of the same class must be taxed at uniform rates, an income tax at graduated rates cannot be levied.[30]

A few other states have shown some tendency to take the same position, though less clearly and con-

[28](1870) 103 Mass. 544, 546.
[29]Loring v. Beverly, (1916) 222 Mass. 331, 110 N. E. 974.
[30]In re Opinion of Justices (1929) 266 Mass. 583, 165 N. E. 900. See also Trefry v. Putnam, (1917) 227 Mass. 522, 116 N. E. 904. The court is obviously correct in its position that if the income tax is a property tax, it cannot properly be levied at graduated rates. See Hackett, The Constitutionality of the Graduated Income Tax Law, (1916) 25 Yale L. J. 427.

sistently than Massachusetts. Thus New Hampshire has recently decided that residents cannot be subjected to income taxes on income derived from property outside the state, on the ground that such a tax would burden such property;[31] but, as will be seen later, the New Hampshire court has been far from consistent in its holdings as to the nature of the income tax. The supreme court of South Carolina has held directly to the contrary as to the power of the state to impose a tax upon income derived by residents from property outside the state.[32] But it may be that the court has a similar idea as to the nature of the income tax for it remarks that its chief purpose is to tax each outside income; income from within the state can be reached by the ordinary property and excise taxes.

Most other state courts, if they concede any validity at all to this theory, very wisely do not permit it to hamper the imposition of an income tax by applying the property tax restrictions.[33] And many state courts reject this theory altogether. The position of these courts is well exemplified by the statement of the Wisconsin Supreme Court in the recent case of *Norris v. Wisconsin Tax Comm.*,[34] when it said: "An income tax is not a tax on property, but a tax against the recipient of the income."[35]

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[31]Opinion of Justices, (1930) 84 N. H. 559, 149 Atl. 321. The United States Supreme Court has, however, recently decided that a state may, so far as the federal constitution is concerned, validly impose a tax upon the entire income of resident individuals, though a substantial part of such income is derived from sources outside of the state. Lawrence v. State Tax Commission, (1932) 286 U. S. 276, 52 Sup. Ct. 556. The Court further held that no constitutional objection arose from the fact that domestic corporations were subjected to tax only upon income from sources within the state.

[32]Crescent Mfg. Co. v. Tax Commission, (1924) 129 S. C. 480, 124 S. E. 761.

[33]See Shields v. Williams, (1929) 159 Tenn. 349, 19 S. W. (2d) 261, and Drexel v. Commonwealth, (1863) 46 Pa. St. 31.

[34](1931) 205 Wis. 626, 238 N. W. 415.

[35](1931) 205 Wis. 626, 631, 238 N. W. 415, 416.

It is submitted, therefore, that the theory of the income tax as a property tax upon the property from which the income is derived is inaccurate, or at least inadequate. Besides the theoretical objections which have been stated, it is utterly inconsistent with the almost unanimous view that both property and the income from it may be taxed without violating state constitutional provisions against double taxation.[33] Accordingly, the theory that an income tax is a property tax must be rejected, unless it is to be regarded as a tax upon the income itself as property.

This is unquestionably a more reasonable theory, and one which is somewhat more widely accepted. Income when first received, in any form, is certainly property, and to tax it as such obviates the objection to the other branch of the property tax theory, which has just been considered, that not all income is derived from property. It may be said that nevertheless all income *is* property.

The theory that the income tax is a property tax imposed upon the income itself as property has been definitely, though after much argument and disagreement, accepted by the supreme court of Alabama in the leading case of *Eliasberg Bros. v. Grimes.*[37] In that case the court attempted to answer the most obvious objection to this theory, that the taxpayer may not still have all his income on the tax day, by saying:

> "Nor is it of consequence that the money thus taxed has left the hands of its quondam owner, however speedily; for the state has the inherent power to tax property owned at any time during the tax year, though it has not always seen fit to do so."[38]

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[36] 1 Cooley, Taxation, 4th ed., sec. 237; 4 Cooley, Taxation, 4th ed., sec. 1756.

[37] (1920) 204 Ala. 492, 86 So. 56.

[38] (1920) 204 Ala. 492, 498, 86 So. 61. See also Ex parte Morrill, (1925) 213 Ala. 697, 106 So. 63.

But even admitting, what may be seriously doubted, that a tax upon all the property which a person had possessed at any time during a period of time could be sustained as a property tax, yet there is still more serious difficulty. To tax a person upon all the income which he received during such a period as property and then again tax all the property into which he may have converted that income and which he possesses on the tax day is certainly double taxation of property.

In spite of this difficulty, the theory now under consideration is accepted in Delaware,[39] and was for a time apparently accepted in New Hampshire.[40] In the New Hampshire case just cited, there was an able dissenting opinion by Justice Peaslee from which the following is quoted:

> "It is important that at the outset the fundamental difference between income and property be stated; and then as we go on it will be more plainly seen how and why the attempt to treat the two things as one must necessarily fail. A man's property is the amount of wealth he possesses at a particular moment while his income is the amount of wealth obtained during some specified period. The two are measured by different standards. One is measured by amount and present possession. The other is determined by receipts, and quantity and time are necessary elements of the measure employed. In the measure of property present ownership is an essential element, and lapse of time can have no place. In the measure of income lapse of time is an essential element, and present possession can have no place. Each is measurable, but a common measure could be applied to both. The two are as incommensurate as a line and an angle."[41]

[39] State v. Pinder, (1919) 30 Del. 416, 108 Atl. 43.
[40] In re Opinion of Justices, (1915) 77 N. H. 611, 93 Atl. 311.
[41] (1915) 77 N. H. 611, 618, 93 Atl. 314.

This reasoning seems unanswerable, and it seems eventually to have persuaded the court, since some years later the court decided that an income tax is not a property tax and so may be levied at graduated rates.[42] The court pointed out that an income tax is not really an annually recurring tax, as is the ordinary property tax. An income tax is generally collected annually, but its amount depends on the activities of the taxpayer and their productiveness during the specified period.

Two other state cases [43] might possibly be cited in favor of the theory that an income tax is a tax on the income as property, but they are by no means clear. It is apparent, therefore, that there is comparatively little authority in favor of this theory, either.

Indeed, the authorities to the contrary are much more impressive. The cases in Georgia extending over a long period squarely reject the idea that income can be regarded as property for tax purposes.[44] The same is true of the Missouri decisions [45]. In a comparatively recent decision in this state, *Ludlow-Saylor Wire Co. v. Wollbrink,* [46] the argument already spoken of that income itself is property was pressed upon the court; but the court answered that while it is true that income is property it is not the kind of property which is contemplated as taxable according to the ordinary rules for property taxation.

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[42]In re Opinion of Justices, (1927) 82 N. H. 561, 138 Atl. 284. But see Opinion of Justices, (1930) 84 N. H. 559, 149 Atl. 321.

[43]New Orleans v. Fourchy, (1878) 30 La. Ann. 910; Alderman v. Wells, (1910) 85 S. C. 507, 67 S. E. 781. Cf. Crescent Mfg. Co. v. Tax Commission, (1924) 129 S. C. 480, 124 S. E. 761.

[44]Savannah v. Hartridge, (1850) 8 Ga. 23; Waring v. Savannah, (1878) 60 Ga. 93; Featherstone v. Norman, (1930) 170 Ga. 370, 153 S. E. 58.

[45]Glasgow v. Rowse, (1869) 43 Mo. 479; Ludlow-Saylor Wire Co. v. Wollbrink, (1918) 275 Mo. 339, 205 S. W. 196.

[46](1918) 275 Mo. 339, 205 S. W. 196.

A leading authority to the effect that an income tax is not a property tax in any sense, is the decision of the supreme court of Mississippi in *Hattiesburg Grocery Co. v. Robertson*,[47] holding that an income tax can be levied in disregard of the limitations imposed by the state constitution with regard to property taxes. The court said:

> "While a tax on income includes some of the elements both of a tax on property and of a tax on persons, it cannot be classified as strictly a tax on either, for it is generically and necessarily an excise."[48]

A similar conclusion was reached after much controversy by the supreme court of Arkansas in *Sims v. Ahrens*.[49] Here the majority thought on the original hearing that the legislature could not impose any state income tax at all, since that would involve the taxation of occupations "of common right," which had been held to be contrary to the state constitution. On rehearing there was a sufficient changing of judicial minds so that the majority of the court now thought that there was no objection to the income tax, on the ground that occupations are not taxed at all by it. It is pointed out that the carrying on of an occupation may not result in any income being received, so that an income tax is not on the occupation. What is taxed is not made clear, but the court is very sure that an income tax is an excise. The court has reiterated this doctrine as to the nature of the income tax in two more recent cases.[50]

Apart from these considerations of existing authorities and of the arguments which they adduce, there are

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[47](1921) 126 Miss. 34, 88 So. 4.
[48](1921) 126 Miss. 34, 52, 88 So. 5.
[49](1925) 167 Ark. 557, 271 S. W. 720.
[50]Stanley v. Gates, (1929) 179 Ark. 886, 19 S. W. (2d) 1000; Baker v. Hill, (1929) 180 Ark. 387, 21 S. W. (2d) 867.

other considerations which seem to show that this conception of the income tax as a property tax on the income itself cannot be sustained. There is, in the first place, the sharp distinction which is made between capital and income.[51] If the thing upon which a purported income tax is attempted to be collected is regarded by the court as capital rather than income, the tax is, of course, invalidated.[52] But it seems clear that capital is even more clearly property than is income. If, therefore, a property tax is to be levied upon income, it should a fortiori be levied upon capital.

Also, as has been pointed out, a taxation of income as property involves double taxation because part of the income is practically certain to be invested in other property itself subject to taxation. Indeed, any retroactive federal income tax is practically, even if not theoretically, objectionable, as involving an unapportioned direct tax upon the property in which the income has been invested, the income itself having disappeared.[53] Such limited retroactivity as is necessary for the efficient collection of the tax, cannot, however, reasonably be objected to.[54]

Even more decisive, and equally applicable to both of these alternative theories of the income tax as a property tax, is the almost unanimous rule that a covenant to pay taxes in general will not be applied to income taxes.[55] If the covenant is intended to include in-

[51]Towne v. Eisner, (1918) 245 U. S. 418, 38 Sup. Ct. 158, 62 L. Ed. 372; Eisner v. Macomber, (1920) 252 U. S. 189, 40 Sup. Ct. 189, 64 L. Ed. 521; Merchants' L. & T. Co. v. Smietanka, (1921) 255 U. S. 509, 41 Sup. Ct. 386, 65 L. Ed. 751; Cooper v. United States, (1930) 280 U. S. 409, 50 Sup. Ct. 164, 74 L. Ed. 516. See also Commonwealth v. Brown, (1895) 91 Va. 762, 21 S. E. 357.

[52]Drexel v. Commonwealth, (1863) 46 Pa. St. 31; Miles v. Safe Deposit Co., (1922) 259 U. S. 247, 42 Sup. Ct. 483, 66 L. Ed. 923. Cf. Taft v. Bowers, (1929) 278 U. S. 470, 49 Sup. Ct. 199, 73 L. Ed. 460.

[53]See Smith, Retroactive Income Taxation, (1923) 33 Yale L. J. 35.

[54]See Smith, Retroactive Income Taxation, (1923) 33 Yale L. J. 35.

[55]4 Cooley, Taxation, 4th ed., sec. 1761.

come taxes, they must be quite definitely mentioned or at least referred to. Thus a covenant by a lessee to pay taxes upon the leased property will not be construed to include income taxes payable by the lessor upon the rent received.[56] Even Massachusetts accepts this doctrine,[57] although it is logically inconsistent with the accepted theory in that state that income taxes are taxes upon the property from which the income is derived. And it has further been held that a tax-free covenant in a bond does not make the obligor liable to pay the income tax incurred by the bondholder with respect to the interest, and this notwithstanding the fact that the income tax is collected at the source and so is withheld by the obligor.[58] It must follow that the tax is not regarded as imposed upon the interest as property. There may be, of course, in either case an explicit covenant to pay the income tax, but if that tax is really on the property the general covenant would cover it.

Finally, *Cook v. Tait*[59] is a decisive authority that an income tax is not a property tax. Here the taxpayer had no property in the United States, and all his income was derived from sources outside this country. There was, therefore, no property for the United States to tax, and if the income tax is a property tax, no such tax could have been exacted.[60] It must

[56]Young v. Ill. Athletic Club, (1923) 310 Ill. 75, 141 N. E. 369; Atlantic, etc., Ry. Co. v. Southern Ry. Co., (1928) 149 Va. 701, 141 S. E. 770; Missouri Athletic Ass'n v. Delk Inv. Corp., (1929) 323 Mo. 765, 20 S. W. (2d) 51.

[57]Stony Brook R. Corp. v. Boston, etc., R. Co., (1927) 260 Mass. 379, 157 N. E. 607 However the income tax here involved was not the state but the federal; and the Massachusetts court has admitted that the federal income tax may be on a different basis from its own.

[58]Urquhart v. Marion Hotel Co., (1917) 128 Ark. 283, 194 S. W. 1.

[59](1924) 265 U. S. 47, 44 Sup. Ct. 444, 68 L. Ed. 895.

[60]Lawrence v. State Tax Commission, (1932) 286 U. S. 276, 52 Sup. Ct. 556, supra, note 31, holding that a state may impose a tax upon residents with respect to their entire income, including that derived from sources outside the state, is also a decisive authority that an income tax is not a property tax, for, as has been shown, such residents could not be taxed upon or with reference to such property.

nically an income tax, but rather an excise upon the right to do business as a corporation. When the income of an individual is taxed, we have technically as well as substantially an income tax, and there is no special privilege on which to base an excise.

Nevertheless, there is good authority as well as reason for holding that an individual income tax is also an excise. Many of the cases already cited as holding that an income tax is not a property tax (especially those rejecting the conception that it is upon the income itself as property) explicitly decide that it is an excise tax;[71] and most of the other decisions in this category encourage an inference to the same effect.[72] Neither is the objection decisive that income taxation is somewhat retroactive in effect, for excise taxes of at least equally retroactive operation have been sustained as against attacks under the federal constitution.[73] And finally, *Springer v. United States*,[74] which has never been overruled though it has been very much limited in effect, sustained the power of the federal government to levy a general income tax, upon the ground that it is in its nature an excise tax.

So far the excise tax theory is unassailable. But *Pollock v. Farmers' Loan & Trust Co.*[75] interposes what is submitted to be an insuperable objection to this theory. The argument of the government in that case was based upon the proposition that an income tax is an excise; and the dissenting opinions urge the same

[71] See especially the cases cited in notes 47-50.
[72] See State v. Gulf etc. R. Co., (1925) 138 Miss. 70, 104 So. 639.
[73] Billings v. United States, (1914) 232 U. S. 261, 34 Sup. Ct. 421, 58 L. Ed. 596. See also United States v. Goelet, (1914) 232 U. S. 293, 34 Sup. Ct. 431, 58 L. Ed. 610, and United States v. Bennett, (1914) 232 U. S. 299, 34 Sup. Ct. 433, 58 L. Ed. 612.
[74] (1880) 102 U. S. 586, 26 L. Ed. 253.
[75] Supra, notes 17 and 18.

theory. Indeed, it does not seem to have been disputed that the federal government has full powers to impose excise taxes, without any limitation, save those applying to all forms of taxation. Such a proposition could hardly have been seriously disputed in 1895, when that case was decided and even less now. But the Court decided that the tax was objectionable as a direct tax upon property, and this necessarily involves the holding that it is not an excise tax. So long as the *Pollock Case* stands, the theory of the income tax as one of the classes of excise taxes cannot be regarded as adequate.

Furthermore—though it must be confessed that this is not so conclusive an argument—there is considerable tendency in judicial thinking to make a sharp distinction between ordinary excise taxes and income taxes. The latter are regarded as belonging in a quite different class from the former. Thus, in *Ould v. Richmond*,[76] the Virginia supreme court decided that a tax upon lawyers was an excise *and not* an income tax, although, because of the division of taxpayers into different classes for computing the amount of the tax, such amount depended very largely upon their respective incomes. Even more emphatic is the decision of the same court in *Commonwealth v. Werth*,[77] that a lawyer who has paid the excise tax must also pay the income tax, the court explicitly pointing out the importance of sharply distinguishing these two classes of taxes. The same distinction has been made by the federal courts between the corporation excise tax of 1909, and the subsequent general income taxes,[78] though, as has

[76](1873) 23 Gratt. (Va.) 464.
[77](1914) 116 Va. 604, 82 S. E. 695.
[78]United States v. Philadelphia etc. R. Co., (D.C. Pa. 1920) 262 Fed. 188; Cadwalader v. Lederer, (D.C. Pa. 1921) 273 Fed. 879.

been shown,[79] the computation of these taxes, so far as they have the same scope, is precisely the same.

It has been contended that a general income tax, as distinguished from one limited to the income from property, is still to be regarded as an excise tax. Thus it has been said:

> "It is probably now generally conceded that a tax laid directly on the income of property is a tax on the property itself . . . although a tax on the income from a trade, profession or employment is undoubtedly an excise; and a tax on income from all sources is also probably an excise, although it includes income from property, since in such a case a special burden is not put upon property by virtue of the ownership thereof."[80]

There are three propositions as to the nature of the income tax laid down in the above quotation. The first of these is justified by the decision in *Pollock v. Farmers' Loan & Trust Co.*[81] The second is probably supported by *Springer v. United States.*[82] But the third proposition, that a general income tax is an excise, is in direct contravention of the decision in the *Pollock Case*, and cannot, therefore, be supported.

Conclusion

It is believed that it has been demonstrated that, while the income tax in its usual general form bears strong analogies to each of the three accepted categories into which all taxes are usually divided, yet it cannot be fitted into any one of them. It is not a per-

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[79] Supra, page 129.
[80] Taxation, 26 R. C. L. 142.
[81] Supra, notes 17 and 18.
[82] (1880) 102 U. S. 586, 26 L. Ed. 253.

sonal tax, because it does not fulfill the requirement of uniformity, and even more clearly because it can be imposed without personal jurisdiction. It cannot be supported as a property tax on either theory by which this classification has been attempted. To treat it as a tax upon the property from which the income is derived ignores the fact that much income is not derived from any property, and yet is taxable and actually taxed. It cannot be treated as a tax upon the income itself as property, because property cannot properly be taxed upon the basis of duration of time, which is the only practical and is the universal, manner of taxing income. And finally, though in theory there is much justification for treating it as an excise tax, and an excise tax, if otherwise justified, may be measured by the income of the taxpayer, yet the authority of the Supreme Court of the United States forbids the inclusion of the general income tax in the class of excise taxes.

Under these conditions it would seem that the position of the counsel for New York state in their argument before the federal Supreme Court in *Travis v. Yale & Towne Co.*,[83] is correct. They maintained that the income tax is "composite" in nature. But if this is sound, and the income tax is a composite of the three usual classifications of taxes, it is apparent that the income tax is in a class by itself. The courts of Georgia and Missouri had entirely the right idea when they decided long ago that the income tax must be put into a separate category,[84] although their enumeration of the various classes of taxes was incomplete.

[83](1920) 252 U. S. 60, 40 Sup. Ct. 228, 64 L. Ed. 460. The argument referred to in the text is summarized in 252 U. S. 61 ff.
[84]See cases cited in note 3, supra.

Wisconsin, at least, has recognized that the income tax is *sui generis*. In the leading case of *State v. Frear*,[85] the court of that state, speaking through Chief Justice Winslow, said:

> "However philosophical the argument may be that taxation of rents received from property is in effect taxation of the property itself, the people of Wisconsin have said that 'property' means one thing, and 'income' means another; in other words that income taxation is not property taxation, as the words are used in the constitution of Wisconsin."[86]

This quotation not only rejects the theory of the *Pollock Case* that the income tax is a property tax, but it emphatically insists that income taxation is in a class by itself. The court has always adhered to this view. In *State v. Johnson*,[87] it said:

> "We have in this state two independent systems of taxation, namely, property tax and income tax, and, while the uniformity clause of the constitution applies to property tax, it has no application to income tax."[88]

Some other courts, though less clearly, have recognized that the income tax cannot be put into any accepted category, but stands alone. Thus the supreme court of South Carolina has stated that it is "primarily a subjective tax imposing personal liability upon the recipient of the income,"[89] though it is clear from the context and from the actual decision that the court was not urging that this tax is to be regarded as merely a

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[85](1913) 148 Wis. 456, 134 N. W. 673. See also State v. Tax Commission, (1915) 161 Wis. 111, 153 N. W. 848.
[86](1912) 148 Wis. 456, 507, 134 N. W. 673, 689.
[87](1919) 170 Wis. 218, 175 N. W. 589.
[88](1919) 170 Wis. 218, 242, 175 N. W. 589, 599. Cf. Norris v. Wisconsin Tax Comm., (1931) 205 Wis. 626, 238 N. W. 415.
[89]Crescent Mfg. Co. v. Tax Commission, (1924) 129 S. C. 480, 485, 124 S. E. 761, 762.

personal tax. And the supreme court of North Carolina uses the following suggestive language:

> "But the tax levied on income is not a property tax, but is a percentage laid on the amount which a man receives, irrespective of whether he spends it, wastes it, or invests it."[90]

Similar language will be found in decisions of the New York courts[91] and of the federal courts.[92] There is thus a growing though as yet by no means clear, recognition of the unique nature of the income tax.

It may be urged that the states have, after all, the sole power to determine the method and basis of their own taxes; that therefore, whatever they determine the nature of their income taxes to be, will be binding.[93] Within limits this is true; though it is quite unfortunate to find some states struggling under fatal judicial handicaps to the imposition of a proper and scientific income tax, simply because the courts of that state have mistakenly decided that it is some other kind of a tax, and subject to the limitations applying to that other form of taxation.[94] Such limitations are almost always sufficient to prevent the use of the peculiar characteristics of the income tax which are its chief virtues. Furthermore, the states cannot conclusively determine the nature of their own forms of taxation when other taxing jurisdictions are concerned. So the ultimate nature of the income tax is of tremendous importance when the problem arises of apportioning taxable

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[90] Purnell v. Page, (1903) 133 N. C. 125, 129, 45 S. E. 534, 535.

[91] People v. State Tax Commission, (1926) 218 App. Div. 1, 217 N. Y. S. 669.

[92] Pa. Cement Co. v. Bradley Const. Co., (1920) (D.C. N.Y.) 274 Fed. 1003, 1006, where the court said "An income tax is not upon any specific sum of money, but is a personal tax, measured by sums of money received [or possibly accrued] to the person taxed during a certain period."

[93] See Maguire v. Trefry, (1920) 253 U. S. 12, 40 Sup. Ct. 417, 64 L. Ed. 739.

[94] See the authorities cited in note 30, supra.

income between two or more states,[95] and when there is a question of state income taxes burdening federal functions, or vice versa. And obviously this is not a question which the state courts can finally decide; ultimately the problem is a constitutional one for the federal courts.

Undoubtedly there are analogies which will be helpful in the solution of all these problems. There are some slight analogies between the income tax and purely personal taxes; much stronger analogies between it and property taxes; and the strongest analogies of all between income and excise taxes. All of these analogies will help in the solution of the unsettled practical problems as to the application of, and limitations on, income taxes; but it is important to remember that they are merely analogies, and useful only as such. The analogies should never be allowed to bind us to the real nature of the income tax, nor to cause us to forget that these practical problems must be solved in the light of that nature. The fundamental nature of the income tax is in short that it is an income tax and nothing else.

[95] See Rottschaefer, State Jurisdiction of Income for Tax Purposes, (1931) 44 Harv. L. Rev. 1075.